

The Settlement Conference as a Dispute Resolution Option in Special Education[†]

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- I. INTRODUCTION
- II. SPECIAL EDUCATION DISPUTE RESOLUTION IN MASSACHUSETTS
 - A. *State Complaint Resolution System*
 - B. *Mediation and Impartial Due Process Hearings*
 - C. *Non-Required Dispute Resolution Options*
- III. THE BSEA SETTLEMENT CONFERENCE
 - A. *Four Criteria for the Settlement Conference*
 - B. *Settlement Conference Procedure*
 - C. *Settlement Conference Distinguished from Mediation*
 - D. *Success of the Settlement Conference*
 - E. *Ongoing Evolution of the Settlement Conference*
- IV. ATTORNEYS' OPINIONS OF THE SETTLEMENT CONFERENCE AS A DISPUTE RESOLUTION OPTION
 - A. *The Perspective of a Families' Attorney*
 - B. *The Perspective of a School Districts' Attorney*
 - C. *Evidence from a Survey of Massachusetts Special Education Attorneys*
- V. CONCLUSION: LESSONS FOR OTHER JURISDICTIONS

I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA)¹ guarantees a Free Appropriate Public Education² to qualifying students with disabilities.³ Given Congress' emphasis on meeting the unique educational needs of each

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¹ 20 U.S.C. §§ 1400–1482 (2012).

² *Id.* § 1401(9).

³ *Id.* § 1401(3).

eligible student,⁴ the statute foregoes a rigid definition of its substantive entitlement, instead providing a robust system of procedural safeguards⁵ that allows parents to pursue individualized determinations of the educational services school districts must provide their children.⁶ In the first instance, this determination occurs through the Individualized Education Program (IEP) process, in which educators and service providers at a child's school conduct evaluations and then design a customized educational program to meet a student's particular needs.⁷ When this process yields an outcome that is unsatisfactory to parents or that does not allow a student to make effective educational progress,⁸ families may challenge the determination of local school officials through a series of due process mechanisms. These include the right to request an impartial due process hearing⁹ and to appeal the outcome of such a hearing to state or federal court.¹⁰

While the vast majority of families whose children receive special education never see the inside of a courtroom,¹¹ the availability of private enforcement has prompted a moderate amount of litigation and the (mis)perception among some commentators that special education is a particularly litigious enterprise.¹² In fact, only a small percentage of cases

⁴ *Id.* § 1401(29) (defining special education as “specially designed instruction...to meet the unique needs of a child with a disability”).

⁵ *See id.* § 1415.

⁶ *See, e.g.,* David M. Engel, *Law, Culture and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 176–77 (discussing Congress’ reasons for preferring an emphasis on procedure over substance).

⁷ *See* 20 U.S.C. § 1414.

⁸ *See* Yael Cannon, Michael Gregory & Julie Waterstone, *A Solution Hiding in Plain Sight: Special Education and Better Outcomes for Students with Social, Emotional and Behavioral Challenges*, 41 FORDHAM URBAN L.J. 403 (2013) (describing common implementation failures in the IEP process that can lead to poor outcomes for students with disabilities).

⁹ 20 U.S.C. § 1415(f).

¹⁰ *Id.* § 1415(i)(2).

¹¹ *See, e.g.,* KELLY HENDERSON, OPTIONAL IDEA ALTERNATIVE DISPUTE RESOLUTION 1 (2008) (“[T]he vast majority of interactions between parents and school personnel about students with disabilities are positive and productive”). *See also* Table 1, *infra* Part II.B., documenting that approximately 95% of IEPs in Massachusetts are never even rejected by parents (the precursor to pursuing a legal remedy); Samuel R. Bagenstos, *The Judiciary’s Now-Limited Role in Special Education*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 121, 121 (Joshua M. Dunn & Martin R. West eds., 2009).

¹² Though our personal experience suggests it is hyperbole, one commentator’s statement serves as an example of this common view about special education:

become embroiled in litigation; nonetheless, the financial and emotional hardship that characterizes that process for both families and school districts¹³ has prompted lawmakers, scholars and practitioners to devote increased attention to finding alternative means for resolving special education disputes when they do arise.¹⁴

For example, Congress' 1997 reauthorization of the IDEA emphasized the benefits of mediation and required all states that receive funds under IDEA to offer mediation of special education disputes at no cost to families or school districts.¹⁵ In its 2004 reauthorization, Congress further trumpeted the importance of providing parents and school districts "expanded opportunities to resolve their disagreements in positive and constructive ways"¹⁶ and included a new requirement that parties participate in a "resolution session" within fifteen days of the filing of a due process complaint, as a final opportunity to resolve a dispute voluntarily before proceeding to hearing.¹⁷

"[V]irtually every school district in the country has had at least one case wind up in court." R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 160–61 (1994) (emphasis supplied). See also Perry A. Zirkel & Brett L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1, 5–6 (2011) (reporting, based on an analysis of Westlaw's key number system, that the number of special education cases filed in federal district court increased from 623 in the 1990s to 1,242 in the 2000s). However, even if each federal case noted by Zirkel and Johnson involved a distinct school district (which is surely not the case), this increased number would still only account for less than 10% of the total number of public school districts in the U.S. (13,588). See NAT'L CTR. EDUC. STATISTICS, *DIGEST OF EDUCATION STATISTICS* (Nov. 2012), available at http://nces.ed.gov/programs/digest/d12/tables/dt12_098.asp.

¹³ For a discussion of the estimated costs of due process proceedings, see Tracy Gershwin Mueller, *Alternative Dispute Resolution: A New Agenda for Special Education Policy*, 20 J. DISABILITY POL'Y STUD. 4, 4 (2009).

¹⁴ As one particularly prominent example of the collective urge to find viable alternatives to litigation, the Office of Special Education Programs within the U.S. Department of Education funds the Center for Appropriate Dispute Resolution in Special Education (CADRE) to serve as a National Center on Dispute Resolution in Special Education. CADRE's mission is "to increase the nation's capacity to effectively resolve special education disputes, reducing the use of expensive adversarial processes." *About Cadre*, CADRE, <http://www.directionservice.org/cadre/about.cfm> (last visited May 5, 2014).

¹⁵ 20 U.S.C. § 1415(e). See also RUTH COLKER, *DISABLED EDUCATION* 101–02 (2013) (discussing Congress' emphasis on mediation in the 1997 reauthorization).

¹⁶ 20 U.S.C. § 1400(c)(8).

¹⁷ See 20 U.S.C. § 1415(f)(1)(B). For an analysis of Congress' decision to include the resolution session in its 2004 reauthorization of IDEA, see Demetra Edwards, *New*

Researchers and commentators have likewise noted the drawbacks associated with due process and litigation and have explored the development of alternatives. One important line of critique has highlighted the significant barriers to accessing the due process system that confront low-income and minority families.¹⁸ It has also been argued that the adversarial due process proceeding fails to result in fair outcomes even for those families who are able to access it.¹⁹ Apart from outcomes, the process itself has also been criticized for “foster[ing] mutual perceptions of dishonesty between the parties” and increasing the “level of antipathy in post-due process relationships.”²⁰ It was hoped that the addition of mediation as an alternative dispute resolution option would remedy some of these problems, and there is a significant literature on the promises and pitfalls of special education mediation.²¹ Recent scholarship has urged policymakers and practitioners to

Amendments to Resolving Special Education Disputes: Any Good IDEAs?, 5 PEPP. DISP. RESOL. L.J. 137, 147–50 (2005).

¹⁸ See, e.g., COLKER, *supra* note 15; Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011); Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 107 (2011)

¹⁹ See, e.g., Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501 (2013) (arguing that the procedural “objective fairness” of due process proceedings undermines their “subjective fairness” and “outcome fairness”); Steven S. Goldberg & Peter J. Kurlioff, *Evaluating the Fairness of Special Education Hearings*, 57 EXCEPTIONAL CHILDREN 546 (1991).

²⁰ Kevin J. Lanigan, Rose Marie L. Audette, Alexander E. Dreier & Maya R. Kobersy, *Nasty, Brutish...and Often Not Very Short: The Attorney Perspective on Due Process*, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 213, 227 (Chester E. Finn, Jr., Andrew J. Rotherham & Charles R. Hokanson, Jr. eds., 2001).

²¹ See, e.g., MELISSA MUELLER, ANITA ENGILES & MARSHALL PETER, *THE INVOLVEMENT OF STUDENTS IN THEIR SPECIAL EDUCATION MEDIATIONS* (2003), available at <http://www.directionservice.org/cadre/student.cfm>; Grace E. D’Alo, *Accountability in Special Education Mediation: Many a Slip ‘Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201 (2003); Jan Marie Fritz, *Improving Special Education Mediation*, 18 INT’L REV. SOC. 469 (2008); Sonja Kerr & Jenai St. Hill, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179 (2012); Peter J. Kurlioff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35 (1997); Branda L. Nowell & Deborah A. Salem, *The Impact of Special Education Mediation on Parent-School Relationships*, 28 REMEDIAL & SPEC. EDUC. 304 (2007); Paul M. Secunda, *Mediating the Special Education Front Lines in Mississippi*, 76 U. MO.-KAN. CITY L. REV. 823 (2008); Andrea Shornberg, *Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?*, 12 OHIO ST. J. ON DISP.

“look beyond the perimeter of special education” as “[e]vidence from other organizations and service sectors can create new practices that are as yet unexplored within the special education arena.”²² In this vein, one prominent advocate and scholar of special education law has called for the addition of arbitration to the spectrum of dispute resolution options.²³ Others have suggested the use of mechanisms such as facilitated IEP meetings, third-party consultations, ombudspersons, and alternative forms of mediation.²⁴ The Center for Appropriate Dispute Resolution in Special Education²⁵ has developed a list of attributes that it believes characterize effective special education dispute resolution systems—including “investment in and support for innovative dispute resolution processes,” such as “capacity building/prevention, early disagreement assistance, and alternative conflict resolution methods”—and has identified four states with exemplary systems.²⁶ Notwithstanding these critiques—and rebutting many of them—Mark Weber argues persuasively in this volume that due process rights are of vital importance to students with disabilities and that alternative options such as those described above should not supplant the due process hearing.²⁷

In the present Article, we contribute to this ongoing dialogue about dispute resolution in special education by describing a unique dispute resolution mechanism—the Settlement Conference—that has been developed in Massachusetts. The Settlement Conference is a voluntary dispute resolution process available to litigants after a hearing request has been filed, wherein the parties receive feedback from a knowledgeable, experienced

RESOL. 739 (1997); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004).

²² Mueller, *supra* note 13, at 7.

²³ See S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 361 (2012) (outlining a proposal for arbitration in special education disputes). A proposal for a binding arbitration option was briefly considered during the 2004 reauthorization of IDEA but ultimately was not included in the law. See Edwards, *supra* note 17, at 156–58 (2005).

²⁴ See Mueller, *supra* note 13.

²⁵ See *supra* note 14.

²⁶ CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., *FOUR EXEMPLARY DISPUTE RESOLUTION SYSTEMS IN SPECIAL EDUCATION* 1 (2010).

²⁷ See Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RES. (forthcoming June 2014). Prof. Weber argues, for example, that mediation “as an adjunct to due process has been successful.” *Id.* at 20 (emphasis supplied). Rather than eliminating the due process hearing system, he proposes several “modest” reforms to make it a more effective mechanism for enforcing students’ educational rights.

neutral on the strengths and vulnerabilities of their respective positions. The intent of the process is to afford parties a final opportunity to resolve their dispute in an informal, non-contentious forum and avoid the time, expense, and relationship damage that the literature—and our own experience—indicates is all too commonly associated with a due process hearing. The explicit—and ambitious—goal of the Settlement Conference is for the parties to draft and execute a binding settlement agreement at the conclusion of the conference.

Anecdotally, the Settlement Conference is a highly popular dispute resolution option in Massachusetts. However, there is a need to understand more precisely why parents, school districts and their attorneys elect to participate in this process and what features of the process the parties find to be particularly effective at helping them resolve their disputes. To this end, we developed and administered a survey to attorneys currently practicing special education law in Massachusetts to elicit how frequently they represent parties in special education due process hearings, how many Settlement Conferences they have participated in, how satisfied or dissatisfied they and their clients are with the Settlement Conference, the reasons for their and their clients' satisfaction or dissatisfaction, and the factors they believe are critical for the Settlement Conference's success at resolving a dispute.

Subsequent to reviewing the general contours of the special education dispute resolution system in Massachusetts (in Part II) and further explicating the details of the Settlement Conference process (in Part III), we report (in Part IV) on the results of our survey and attempt to shed light on the reasons for the apparent effectiveness of the Settlement Conference, which the survey confirms. Finally, we conclude (in Part V) with reflections about elements of the Massachusetts system that allow for the Settlement Conference to be effective (including, importantly, a strong underlying commitment to special education due process generally) and takeaways for other jurisdictions that might seek to implement a similar process.

II. SPECIAL EDUCATION DISPUTE RESOLUTION IN MASSACHUSETTS

As is true in most jurisdictions, Massachusetts offers a variety of special education dispute resolution options to parents and school districts.²⁸ In addition to those options that are required by the IDEA—a state complaint

²⁸ For a compilation of the dispute resolution options available in the various U.S. states and territories, see *State/Territory Dispute Resolution Database*, CADRE, <http://www.directionservice.org/cadre/state/> (last visited Mar. 9, 2014).

THE SETTLEMENT CONFERENCE

process,²⁹ mediation,³⁰ and due process hearings³¹—Massachusetts also employs a spectrum of non-required dispute resolution options. In this Part, we first outline the special education dispute resolution system in Massachusetts generally. Understanding the full range of special education dispute resolution options in Massachusetts is a necessary context for appreciating the development and effectiveness of the Settlement Conference. First, we describe the state complaint resolution system, which is administered by the Massachusetts Department of Elementary and Secondary Education (DESE). Then we describe the mediation and impartial due process hearing systems, which are both administered by the Massachusetts Bureau of Special Education Appeals (BSEA).³² Finally, we describe three non-required dispute resolution options that are available in Massachusetts: the SpedEx Program, the Facilitated IEP Meeting, and the BSEA Advisory Opinion. After supplying this general context, we then proceed in the subsequent Part to describe the development of one particular non-required dispute resolution option—the BSEA Settlement Conference—that is somewhat unique to our jurisdiction³³ and that has become a highly utilized component of the special education dispute resolution landscape.

A. State Complaint Resolution System

DESE has assigned all of its compliance and monitoring functions to a division called Program Quality Assurance Services (PQA). PQA's duties include monitoring the compliance of all school districts, charter schools and education collaboratives³⁴ with a host of both state and federal education-

²⁹ See 34 C.F.R. § 300.151 (2012).

³⁰ See 20 U.S.C. § 1415(b)(5), (e).

³¹ See 20 U.S.C. § 1415(b)(6), (f).

³² See *infra* Part II.B.

³³ Pennsylvania recently began offering a similar process called the “Evaluative Conciliation Conference.” See Cathy Skidmore, Remarks at the Ohio State Journal on Dispute Resolution Symposium: Dispute Resolution in Special Education 22 (Feb. 27, 2014) (on file with authors); *Evaluative Conciliation Conference (ECC)*, OFFICE FOR DISP. RESOL., <http://odr-pa.org/alternative-dispute-resolution/evaluative-conciliation-conference/> (last visited May 19, 2014).

³⁴ Like many other states, Massachusetts allows for regional educational entities called “education collaboratives,” which are defined by statute as “association[s] of school committees and charter school boards which [are] formed to deliver ... programs and services,” which can include “instructional, administrative, facility, community or any other services ... to complement the educational programs of member school

related laws: Special Education, English Learner Education, Career Vocational/Technical Education, and all relevant federal and state civil rights laws.³⁵ As part of its oversight of the special education system, PQA provides technical assistance, implements the approval and monitoring processes for private special education schools, reviews all requests for regulatory waivers, and implements complaint management procedures through the Problem Resolution System (PRS).³⁶ PRS is “the process for handling complaints from the public about students’ educational rights and the legal requirements for education,”³⁷ which includes complaints from parents regarding the provision of special education and related services to children with disabilities.

Any parent who is concerned about possible violations of special education law can contact PQA by mail, email, fax or phone.³⁸ PQA employs PRS specialists, who can both assist with resolving a problem informally and conduct a formal investigation when a parent files an official complaint.³⁹ Violations alleged in a complaint must have occurred within the one-year statute of limitations imposed by federal special education regulations.⁴⁰ The PRS specialist first sends a letter to the relevant school district, informing it of the subject of the complaint and requesting that it conduct a local investigation. The school district must then submit a written report responding to the complaint and including any additional relevant information. PRS specialists will review any relevant documents submitted by the parent or the school district and, if he or she determines additional

committees and charter schools in a cost-effective manner.” MASS. ANN. LAWS ch. 40, § 4E.

³⁵ See *Program Quality Assurance Services*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC., <http://www.doe.mass.edu/pqa/role.html> (last visited Mar. 9, 2014).

³⁶ See *id.*

³⁷ *The Problem Resolution System Information Guide*, MASS. DEP’T ELEMENTARY & SECONDARY EDUC., <http://www.doe.mass.edu/pqa/prs/> (last visited Mar. 9, 2014). This Guide is also available in Spanish, http://www.doe.mass.edu/pqa/prs/PRS%20_Guide_Spanish.pdf (last visited Mar. 9, 2014).

³⁸ See *id.* All of the information in this paragraph, unless otherwise noted, is adapted from the DESE Guide.

³⁹ Parents can initiate a formal complaint with PQA by completing and submitting a brief, two-page form that is available in English and Spanish on the DESE website. MASS. DEP’T ELEMENTARY & SECONDARY EDUC., PROGRAM QUALITY ASSURANCE SERVICES PROBLEM RESOLUTION SYSTEM INTAKE INFORMATION FORM (2013), available at <http://www.doe.mass.edu/pqa/prs/IntakeForm.pdf> (last visited Mar. 9, 2014), and the Spanish version is available at http://www.doe.mass.edu/pqa/prs/IntakeForm_Spanish.pdf (last visited Mar. 9, 2014).

⁴⁰ See 34 C.F.R. § 300.153(c).

THE SETTLEMENT CONFERENCE

information is necessary, may interview individuals or conduct an onsite investigation. The PRS specialists are not required to be attorneys, but they can consult with attorneys in the office of the DESE General Counsel. Within sixty calendar days from receipt of the signed complaint,⁴¹ PQA will issue a written finding (in the form of a letter to the parent and the district) as to whether the district has failed to comply with the law and what action, if any, the district must take to correct its noncompliance.⁴² Remedial action can include the provision of compensatory education to make up for a failure to provide a student with his or her free appropriate public education.⁴³

The PRS process can be an effective dispute resolution option for parents in situations where there is a relatively discrete and clear-cut violation of special education law. The timeline for resolution of state complaints is much shorter than the due process timeline and the barriers to accessing the PRS system are much less onerous. There is relatively little cost involved and many parents can comfortably initiate a complaint and explain their dispute without need for assistance from an attorney. These features can make the state complaint resolution process attractive for parents who do not have access to legal assistance. However, it is not a process that is designed to make credibility determinations, weigh the professional opinions of competing experts or resolve complex questions about a student's effective educational progress or the appropriateness of placements or services.⁴⁴ The PRS process is therefore not suitable for many special education matters, particularly matters where there is a dispute over what constitutes a student's free appropriate public education.

⁴¹ See 34 C.F.R. § 300.152(a). The federal regulations also allow for certain limited exceptions to the 60-day timeline. See 34 C.F.R. § 300.152(b).

⁴² In Massachusetts, the PRS specialists' findings are not reported publicly. This is in contrast to other jurisdictions where complaint resolution decisions are posted on the state agency's website. See, e.g., Ruth Colker, *Special Education Complaint Resolution: Ohio*, 29 OHIO ST. J. ON DISP. RES. (forthcoming June 2014) (analyzing state complaint decisions from the Ohio Department of Education that the author obtained on its website). This is also in contrast to rulings and decisions in Massachusetts due process hearings, which are both posted by the BSEA and reported in the Massachusetts Special Education Reporter. See *infra* at 14

⁴³ See 34 C.F.R. § 300.151(b). Remedial action can also include monetary reimbursement and appropriate future provision of services for all children with disabilities. *Id.*

⁴⁴ See Colker, *supra* note 42 (noting that "[u]nlike the resolution of a due process hearing, the state is not likely to order remedies that require subjective determinations like the elements of a new Individualized Educational Program, the provision of publicly-funded private education for an individual child in the future, or the right to extended school year services for an individual child.")

B. Mediation and Impartial Due Process Hearings

The IDEA also requires states to offer mediation and impartial due process hearings. In Massachusetts, these dispute resolution systems are administered by the Bureau of Special Education Appeals (BSEA). A creature of state statute, the BSEA is housed within the Division of Administrative Law Appeals (DALA), which is part of the Executive Office of Administration and Finance.⁴⁵ The BSEA has jurisdiction over all disputes arising under the IDEA, the state special education statute, Section 504 of the Rehabilitation Act of 1973, and all related regulations.⁴⁶ According to statute, the hearing officers and mediators who are employed by the BSEA can only work “on matters within the bureau’s jurisdiction,” meaning that they cannot be assigned matters that fall under the general jurisdiction of DALA—such as cases from the Civil Service Commission or the Board of Registration in Medicine.⁴⁷ Similarly, absent limited exceptions, BSEA matters cannot be assigned to non-Bureau hearing officers or other employees of DALA.⁴⁸ Though DALA provides administrative support to the BSEA and though the Chief Administrative Magistrate of DALA is responsible for hiring and supervising the BSEA Director, DESE retains its responsibility under IDEA for general oversight of the BSEA and for ensuring its compliance with all aspects of the federal special education law.⁴⁹

Statute requires that the BSEA be administered by a full-time Director who is “an attorney with extensive knowledge and experience in the areas of litigation, administrative law and special education law.”⁵⁰ The Director has operational authority over the BSEA’s activities and over all of its hearing officers and mediators. The mediators are required to be “knowledgeable and skilled” and the hearing officers are required to be “knowledgeable and

⁴⁵ See MASS. ANN. LAWS ch. 7, § 4H.

⁴⁶ See MASS. ANN. LAWS ch. 71B, § 2A(a).

⁴⁷ See MASS. ANN. LAWS ch. 71B, § 2A(c).

⁴⁸ See *id.* The Director of the BSEA may, on a temporary basis and for a period not to exceed 6 months, assign BSEA matters to non-Bureau hearing officers or mediators that meet all the same standards and qualifications as BSEA employees in situations where there is a temporary caseload increase at the BSEA or where there is a temporary absence of BSEA staff. See *id.*

⁴⁹ See MASS. ANN. LAWS ch. 71B, § 2A(a). See also 20 U.S.C. § 1412(a)(11) (“The State educational agency is responsible for ensuring that ... the requirements of this part are met...”); 34 C.F.R. § 300.149.

⁵⁰ MASS. ANN. LAWS ch. 71B, § 2A(a). As indicated earlier, one of the authors currently serves as Director of the BSEA.

experienced attorneys;" both groups must also meet the qualifications set forth in relevant federal special education regulations, as well as any minimum requirements established by the Massachusetts Board of Elementary and Secondary Education.⁵¹ Currently, there are seven mediators and seven hearing officers employed by the BSEA.

As in other jurisdictions, the mediation offered by the BSEA is a voluntary, confidential process that parties may access to resolve their conflicts in special education disputes.⁵² It remains voluntary at all points unless and until a mediation agreement is signed, at which point the mediation agreement is legally binding.⁵³ The conversations between the mediator and parties, whether in joint session or private caucus, are confidential to promote the free exchange of ideas, collaboration and solution generation.⁵⁴ Mediation is less formal than many other dispute resolution options. Parties do not present evidence or make formal legal arguments. Rather, they acknowledge disagreement and work together in good faith to problem-solve and find mutually agreeable solutions. The mediator, a neutral third party, facilitates the process, but parties maintain control of the outcome.⁵⁵ While service providers, administrators, attorneys, advocates, and other experts may be present at mediations, the only participants who must be present are those who have decisionmaking authority (typically parent and special education director). Parties primarily view mediation as a valuable early intervention, and thus the majority of mediations take place prior to the filing of a hearing request.

⁵¹ See MASS. ANN. LAWS ch. 71B, § 2A(c). Relevant federal requirements for mediators are found at 34 C.F.R. § 300.506(b) and relevant requirements for hearing officers are found at 34 C.F.R. § 300.511(c). See also Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5–6 (2010) (reviewing states' requirements for hearing officers).

⁵² For an overview of special education mediation in Massachusetts, see *Mediation*, BUREAU SPECIAL EDUC. APPEALS, <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/mediation/> (last visited Apr. 20, 2014).

⁵³ See 20 U.S.C. § 1415(e)(2)(F). A written mediation agreement is enforceable in both state and federal court. 20 U.S.C. § 1415(e)(2)(F)(iii).

⁵⁴ See 20 U.S.C. § 1415(e)(2)(G) ("Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.")

⁵⁵ For a description of the typical process followed by mediators in Massachusetts, see *The Mediation Process*, BUREAU SPECIAL EDUC. APPEALS, <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/mediation/the-mediation-process.html> (last visited Apr. 20, 2014).

BSEA mediators are highly cognizant of the fact that in special education matters, parties will likely have an ongoing relationship that continues for many years beyond the instant dispute. Therefore, mediation assists the parties in developing a vocabulary for solution-oriented collaboration that can also be useful when future challenges arise in the relationship. The seven BSEA mediators are regionally based and often develop a strong working relationship with parents, parent advocates, and public school special education directors, as well as an understanding of the distinct workings of the school districts they cover. This affords the mediator a greater understanding of the particular issues faced by a given set of parties and the likely avenues to resolution.

In Massachusetts, many parents and school districts have found mediation an effective conflict resolution process. Massachusetts has the highest per capita percentage of special education mediations in the United States, and it conducts the second highest number of special education mediations in the country (second only to California).⁵⁶ (See Table 1.)

Due process hearings before the BSEA are governed by the Massachusetts State Administrative Procedure Act, its implementing regulations, and the *Hearing Rules for Special Education Appeals*.⁵⁷ Unlike some jurisdictions, the BSEA's *Hearing Rules* allow for substantial pre-hearing motion and discovery practice.⁵⁸ For example, parties can serve requests for documents and interrogatories⁵⁹ and move for permission to

⁵⁶ But see Edwards, *supra* note 17, at 146 ("Some may argue that the statistics [on mediation agreements] support the proposition that mediation is a successful means of resolving special education disputes. However, the ability to come to a *final* resolution does not necessarily equate to the ability to create a *good* resolution that is appropriate for the child, or in compliance with the requirements of FAPE.") (emphasis in original; citations omitted).

⁵⁷ See MASS. ANN. LAWS ch. 30A; 801 MASS. CODE REGS. 1.01; MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., HEARING RULES FOR SPECIAL EDUCATION APPEALS (2008), available at <http://www.mass.gov/anf/docs/dala/bsea/hearing-rules.pdf> (last visited Mar. 16, 2014) [hereinafter HEARING RULES]. State statute explicitly grants discretion to the BSEA Director to "issue such rules and procedures as are necessary to carry out the bureau's functions ... consistent with applicable statutes, the [Board of Elementary and Secondary Education's] regulations and the division of administrative law appeal's policies." MASS. ANN. LAWS ch. 71B, § 2A(a).

⁵⁸ See HEARING RULES, *supra* note 57, at 12. But see Perry Zirkel, Remarks at the Ohio State Journal on Dispute Resolution Symposium: Dispute Resolution in Special Education 55 (Feb. 27, 2014) (noting that many jurisdictions do not allow for discovery practice in special education due process proceedings).

⁵⁹ See HEARING RULES, *supra* note 57, at 13.

conduct depositions.⁶⁰ The trend in Massachusetts has been toward more frequent use of these discovery mechanisms.⁶¹ School districts often use discovery to obtain information about out-of-district placements or programs parents may be seeking as relief in their hearing request. Parents often use these mechanisms to obtain information about the profiles of other students in a program being proposed by the school district (through redacted copies of IEPs) and information about the background and credentials of district personnel who are or would be working with their student.

The *Hearing Rules* also establish prehearing mechanisms that provide opportunities for parties to resolve their disputes before the start of the hearing, in addition to the resolution session mandated by the IDEA.⁶² For example, the *Hearing Rules* direct the hearing officer to schedule a prehearing Conference Call with both parties nineteen days after the receipt of the moving party's hearing request.⁶³ This call is an opportunity to address discovery and scheduling matters, but it is also a chance to discuss what transpired at the resolution session (if one has occurred) and otherwise discuss whether the case is one that might be amenable to settlement. In our experience, the prehearing Conference Call has often jumpstarted subsequent confidential settlement negotiations between the parties.⁶⁴

⁶⁰ See *id.* The *Hearing Rules* only authorize hearing officers to grant such permission where a prospective witness is unable to attend the hearing at all or where attendance would constitute a substantial hardship. *Id.*

⁶¹ Increased use of discovery may be part of a larger trend toward greater legalization of special education due process proceedings. See, e.g., Perry A. Zirkel, Zorka Karanxha & Anastasia D'Angelo, *Creeping Judicialization In Special Education Hearings?: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007) (discussing the increased "judicialization" of special education disputes in Iowa).

⁶² See 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R. § 300.510. In our anecdotal experience, the resolution session is not a widely used or particularly effective dispute resolution mechanism in Massachusetts. Therefore, we do not discuss the resolution session at length in this Article. For a critique of the resolution session, see Edwards, *supra* note 17, at 151 ("[F]orcing the parties to meet yet again is an unnecessary step in the [dispute resolution] process. In fact, it will serve as a blockade to the due process hearing and yet another procedural requirement of the type Congress is trying to eliminate."). For a survey of state practices related to the resolution session, see Kelly Henderson & Philip Moses, *Resolution Sessions: State Supports and Practices*, NASDSE INFORUM (Oct. 2008), <http://www.nasdse.org/Default.aspx?TabID=448&TabIDOrig=450&ProductID=1364&categoryid=0&langID=0&CurrPage=1&Search=Resolution&SearchCurrPage=1&cs=0&tmpModID=-1> (last visited Mar. 17, 2014).

⁶³ See HEARING RULES, *supra* note 57, at 8.

⁶⁴ For example, the pre-hearing conference call is often the moment when the parties will agree to participate in a BSEA Settlement Conference. See *infra* Part III.

The *Hearing Rules* also allow for (but do not require) a Prehearing Conference. This in-person meeting between the hearing officer and the parties can be used for a variety of purposes: “clarification of issues; remedies; identification of areas of agreement and disagreement; discovery; date for exchange of exhibits; length of hearing; need for an interpreter and/or stenographer; *settlement*; prehearing conference orders; and/or organization of the proceedings.”⁶⁵ Either party can request a Prehearing Conference, or the hearing officer can convene one *sua sponte*.⁶⁶ Underscoring the role of the Prehearing Conference as an opportunity for settlement, the *Hearing Rules* require that participants “must have full authority to settle the case or have immediate access to such authorization.”⁶⁷ Nonetheless, while it is not uncommon for cases to resolve at or soon after a Prehearing Conference, there are constraints on its utility as a mechanism for dispute resolution. Most of the stated purposes for the Prehearing Conference involve preparing for hearing. Debating the details of the hearing may perpetuate a spirit of adversarialness and generate momentum toward going to hearing. Further, given the hearing officer’s role as a neutral adjudicator who will ultimately decide the case on the merits, his or her ability to influence negotiations between the parties is necessarily limited.⁶⁸ Finally, because the assent of both parties to participate in the Prehearing Conference is not required, participation is not necessarily voluntary and it may not be the starting presumption of the parties that settlement is possible or even desirable.

For matters that proceed to full evidentiary hearing, the hearing officer issues a written decision subsequent to the close of the record. BSEA Decisions are posted publicly on the BSEA website.⁶⁹ These decisions are

⁶⁵ HEARING RULES, *supra* note 57, at 11 (emphasis supplied).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Massachusetts courts have recognized strong public policy justifications for maintaining the confidentiality of settlement discussions. *See, e.g., Zucco v. Kane*, 789 N.E.2d 115, 121 (Mass. 2003) (noting “the public policy repercussions of discouraging compromise by penalizing candor between bargaining parties” if statements made in the context of settlement are introduced in court). Congress’ recognition of these same public policy considerations is reflected in its explicit requirement that discussions taking place during mediations “may not be used as evidence in any subsequent due process hearing or civil proceeding.” 20 U.S.C. § 1415(e)(2)(G). *See also supra* note 54.

⁶⁹ Because Massachusetts has a one-tier due process system, these decisions may be appealed directly to state or federal court. *See* MASS. ANN. LAWS ch. 71B, § 3; 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.156. For a discussion of the distinctions between one-tier and two-tier due process systems, *see* Zirkel & Scala, *supra* note 51, at 5.

also published and reported in the Massachusetts Special Education Reporter (MSER).⁷⁰ In addition to reporting full hearing decisions, the MSER also reports all substantive rulings. Both decisions and rulings are indexed in subject matter digests and searchable online (with a subscription), and the reporter also publishes case commentary from experienced attorneys on both sides of the bar. It is a resulting and notable feature of special education legal practice in Massachusetts that familiarity with the hearing officers' decisions is assumed and a relatively coherent body of local case law has developed over the years. This facilitates settlement of cases by providing the parties a well-defined legal shadow within which to bargain.⁷¹

As is true across the country, relatively few parents and students in Massachusetts dispute the special education and related services offered by school districts—only 5.4% of IEPs were rejected in 2013—and even fewer access mediations or impartial due process hearings at the BSEA. (See Table 1.) Statistics for the past 10 years indicate that, as a percentage of the total number of students with IEPs in Massachusetts, the rates of participation in mediation (approximately 0.5%), filing of hearing requests (approximately 0.4%), and participation in full due process hearings (approximately 0.03%) have remained fairly constant. There was an initial increase in the total number of IEPs (from 154,391 in 2004 to a peak of 166,037 in 2009), but this trend has reversed, with a decline to 163,921 IEPs in 2013. The absolute number and the percentage of rejected IEPs have both increased (from 5,515 and 3.6% in 2004 to 8,860 and 5.4% in 2013). The overall number of mediations has increased (from a low of 601 in 2004 to a peak of 917 in 2012); however, as a percentage of rejected IEPs, the use of mediation by dissatisfied parents has declined (from a high of 14.1% in 2006 to a low of 9.2% in 2013). The absolute number of hearing requests has also declined (from a high of 768 in 2005 to a low of 544 in 2011), as has the rate of requesting a hearing, expressed as a percentage of rejected IEPs (from a high of 12.8% in 2005 to a low of 6.2% in 2013).⁷² These latter statistics are

⁷⁰ See LAND LAW, <http://www.landlaw.com/ma-special-education-reporter.asp> (last visited Mar. 17, 2014).

⁷¹ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

⁷² An important caveat here is that not all hearing requests are made by parents. School districts occasionally file hearing requests against parents (for example, when they have proposed a placement that they believe constitutes a student's FAPE but that the parent has rejected) and against other school districts (for example, when there is a residency dispute over which district should be fiscally and/or programmatically responsible for implementing a students' IEP). While the data reported here do not disaggregate parent-filed and district-filed hearing requests, the latter are few enough that

perhaps the most noteworthy. While more sophisticated analysis is required, they seem consistent with the interpretation that there are slightly more parents in Massachusetts who feel their children are not receiving an appropriate education, but that parents are utilizing the BSEA to help them resolve these disputes at a diminished rate.

Table 1
Special Education Mediations and Due Process Hearings in Massachusetts
(2004-2013)⁷³

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total IEPs	154,391	157,108	160,752	163,396	164,298	166,037	164,847	164,711	163,679	163,921
Rejected IEPs	5,515	6,009	5,475	6,245	7,401	7,252	7,875	8,384	8,460	8,860
% Rejected	3.6%	3.8%	3.4%	3.8%	4.5%	4.4%	4.8%	5.1%	5.2%	5.4%
Mediations	601	660	773	841	906	846	854	809	917	818
as % of Total IEPs	0.4%	0.4%	0.5%	0.5%	0.6%	0.5%	0.5%	0.5%	0.6%	0.5%
as % of Rejected IEPs	10.9%	11.0%	14.1%	13.5%	12.2%	11.7%	10.8%	9.6%	10.8%	9.2%
Hearing Requests	648	768	568	592	618	609	545	544	582	552
as % of Total IEPs	0.4%	0.5%	0.4%	0.4%	0.4%	0.4%	0.3%	0.3%	0.4%	0.3%
as % of Rejected IEPs	11.7%	12.8%	10.4%	9.5%	8.4%	8.4%	6.9%	6.5%	6.9%	6.2%
Hearings	53	35	34	41	34	48	50	35	52	30
as % of Total IEPs	0.03%	0.02%	0.02%	0.03%	0.02%	0.03%	0.03%	0.02%	0.03%	0.02%
as % of Rejected IEPs	1.0%	0.6%	0.6%	0.7%	0.5%	0.7%	0.6%	0.4%	0.6%	0.3%
as % of Hearing Requests	8.2%	4.6%	6.0%	6.9%	5.5%	7.9%	9.2%	6.4%	8.9%	5.4%

the failure to disaggregate does not meaningfully distort the overall picture painted by the data.

⁷³ Data in this table were obtained from the BUREAU SPECIAL EDUC. APPEALS, <http://www.mass.gov/anf/docs/dala/bsea/bsea-10-year-statistics.pdf> (last visited Mar. 17, 2014).

THE SETTLEMENT CONFERENCE

Table 2
Representation and Outcomes in Massachusetts Special Education Due
Process Hearings (2004–2013)⁷⁴

	2004	2005	2006*	2007*	2008*	2009*	2010	2011	2012*	2013
Parents represented by counsel	37	17	11	16	10	12	18	15	15	9
as % of Total Hearings	78.7%	50.0%	44.0%	51.6%	38.5%	28.8%	39.1%	42.9%	38.5%	31.0%
Parents represented by lay advocate	1	4	2	1	2	3	7	3	6	2
as % of Total Hearings	2.1%	11.8%	8.0%	3.2%	7.7%	7.1%	15.2%	8.6%	15.4%	6.9%
Parents appeared <i>pro se</i>	9	13	12	14	14	27	21	17	18	18
as % of Total Hearings	19.1%	38.2%	48.0%	45.2%	53.8%	64.3%	45.7%	48.6%	46.2%	62.0%
District represented by counsel	47	34	24	31	26	42	46	35	39	29
as % of Total Hearings	100%	100%	96.0%	100%	100%	100%	100%	100%	100%	100%
Parents Fully Prevailed	20	8	9	6	7	6	9	7	13	6
as % of Total Hearings	37.7%	22.9%	26.5%	14.6%	20.6%	12.5%	18.0%	20.0%	25.0%	20.0%
Parents represented by counsel	18	5	6	5	4	3	5	5	7	5
Parents represented by lay advocate	0	1	1	0	0	1	2	0	2	0
Parents appeared <i>pro se</i>	2	2	2	1	3	2	2	2	4	1
District represented by counsel	20	8	9	6	7	6	9	7	13	6
School District Fully Prevailed	20	19	16	25	19	36	29	22	26	19
as % of Total Hearings	37.7%	54.3%	47.1%	61.0%	55.9%	75.0%	58.0%	62.9%	50.0%	63.3%
Parents represented by counsel	15	8	5	11	6	9	8	9	8	3
Parents represented by lay advocate	0	3	1	1	2	2	5	2	4	2
Parents appeared <i>pro se</i>	5	8	10	13	11	25	16	11	14	14
District represented by counsel	20	19	15	25	19	36	29	22	26	19
Mixed Relief	7	7	9	8	6	5	8	6	13	4
as % of Total Hearings	13.2%	20.0%	26.5%	19.5%	17.6%	10.4%	16.0%	17.1%	25.0%	13.3%
Parents represented by counsel	4	4	n/a	n/a	n/a	n/a	5	1	n/a	1
Parents represented by lay advocate	1	0	n/a	n/a	n/a	n/a	0	1	n/a	0
Parents appeared <i>pro se</i>	2	3	n/a	n/a	n/a	n/a	3	4	n/a	3
District represented by counsel	7	7	n/a	n/a	n/a	n/a	8	6	n/a	4

⁷⁴ Data in this Table were obtained from *BSEA Statistics*, BUREAU SPECIAL EDUC. APPEALS, <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/bsea-statistics.html> (last visited Mar. 17, 2014). For some years the total number of hearings held (see Table 1) is greater than the total that results from adding up the cases in which parents fully prevailed, the cases where districts fully prevailed and the cases where there was mixed relief. This is because there are occasionally hearings that involve a state agency or hearings regarding a dispute between two districts; such hearings are not reflected in this Table.

It is also important to review the statistics regarding representation of parents and school districts at BSEA hearings and the outcomes of hearing decisions. (See Table 2.) The total number of hearings is small enough that variation from year to year may not be statistically significant; however, data from the past 10 years do appear to support some basic generalizations. First, school districts were virtually always represented by counsel at due process hearings; only once in the last decade was the district unrepresented at hearing (in 2006, and the district nonetheless fully prevailed). In contrast, parents were represented much less frequently; while the percentage fluctuated from year to year, parents tended to be represented less than half the time (and in some years significantly less). Occasionally, parents were represented by lay advocates at hearing,⁷⁵ but this tended to occur less than 10% of the time.

Unsurprisingly, parents who were represented by counsel were significantly more likely to prevail fully at hearing than those without a lawyer.⁷⁶ The picture is somewhat more complicated in cases where mixed relief was obtained; in three of the years with available data, the number of *pro se* parents obtaining mixed relief approximated the number who obtained mixed relief with assistance of counsel, and in the most recent two years a *greater* number of *pro se* parents obtained mixed relief.⁷⁷ These mixed relief cases accounted for roughly 15%–25% of fully adjudicated hearing decisions. School districts prevailed fully about 55%–65% of the time and parents prevailed fully about 20%–25% percent of the time (though individual years saw peaks and valleys that fell outside these general ranges).

Undoubtedly, unequal access to legal representation played some role in the higher win rate for school districts.⁷⁸ Likewise, as parents are the moving party in a majority of cases, logic would suggest that bearing the burden of

⁷⁵ For a discussion of lay advocates in special education proceedings, see EILEEN M. AHEARN, *THE INVOLVEMENT OF LAY ADVOCATES IN DUE PROCESS HEARINGS* (October 2001), available at <http://www.directionservice.org/cadre/pdf/layad.pdf>. See also Cope-Kasten, *supra* note 19, at 527 (2013).

⁷⁶ The Supreme Court has upheld the right of parents to pursue special education matters *pro se*. See *Winkelman v. Parma City School District*, 550 U.S. 515 (2007).

⁷⁷ One caveat here is that the data do not indicate the nature or amount of relief obtained. It may be that a greater number of *pro se* parents obtained mixed relief than did parents with attorneys in 2011 and 2013, but it is possible that they received disproportionately less relief in these cases than the school districts did. Therefore, it is not necessarily clear that these “partially prevailing” parents fared better than they would have with attorneys.

⁷⁸ For a discussion of families’ unequal access to legal representation in the context of the availability of attorneys’ fees, see *infra* note 128.

persuasion also dampened their success rate.⁷⁹ In addition, school districts' vulnerability to payment of attorney's fees in cases where parents prevail at hearing,⁸⁰ likely leads districts to settle cases they do not perceive as strong. It would be inaccurate, however, to assume on the basis of these data from *fully adjudicated hearings* that parents who file due process hearing requests at the BSEA are only able to obtain significant relief a quarter of the time.⁸¹ As Table 1 indicates, only about 5%–9% of hearing requests filed in a given year actually resulted in a hearing; the remainder of the cases were either settled by the parties or withdrawn for other reasons. It is possible—and, our anecdotal experience suggests, likely—that parents were able to obtain substantial relief in many of these unadjudicated disputes.

C. Non-Required Dispute Resolution Options

In addition to the federally required state complaint, mediation and due process systems, Massachusetts offers parents and school districts a series of other options for resolving their special education disputes. These include the SpedEx Program, supported and funded by the Department of Elementary and Secondary Education (DESE) and administered by Boston College, and the Facilitated IEP Meeting and Advisory Opinion process, both administered by the BSEA. (The Settlement Conference, an additional non-required dispute resolution option, is the focus of this Article and we describe it at length beginning *infra* in Part III.)

The SpedEx Program is a voluntary option to assist parents and school districts to resolve their special education disputes. It provides (at no cost to the parties) a mutually agreed upon independent expert consultant to observe and review information about the student, evaluate the educational program proposed by the district and assist the parties in determining the program that will provide the student with a free, appropriate public education in the least restrictive environment.⁸² The SpedEx process may be initiated after an IEP

⁷⁹ See *Schaffer v. Weast*, 546 U.S. 49 (2005) (holding that the moving party bears the burden of persuasion in special education matters).

⁸⁰ See 20 U.S.C. § 1415(i)(3)(B).

⁸¹ It would also be inaccurate to assume that these data indicate bias on the part of hearing officers. See Perry A. Zirkel, *Special Education Hearing Officers: Balance and Bias*, 24 J. DISABILITY POL'Y STUD. 67 (2012) (arguing that a 50%–50% win-loss rate between parents and school districts is a false measure of impartiality and suggesting factors other than impartiality that contribute to a lopsided win rate for districts).

⁸² See SPEDEX, <http://spedexresolution.com/> (last visited Mar. 18, 2014). This website is the basis for all of the information reported in this paragraph.

has been rejected or after a hearing request has been filed, and consent of both parties to participate is required.⁸³ SpedEx maintains a list of special education consultants from whom parents and school districts jointly select three agreeable choices.⁸⁴ (Currently there are sixteen consultants on the panel.⁸⁵) After a consultant is assigned to a case, he or she has approximately thirty days to interview all relevant parties, review evaluations and other information about the student, observe the student and the proposed program, and write a report containing recommendations.⁸⁶ The report becomes part of the student record.

The parties are not bound to accept the recommendations of the consultant; however, if accepted the school district prepares an IEP reflecting the recommendations and there is an expectation that the student will be placed in the recommended program within thirty days of the agreed upon IEP.⁸⁷ After the placement, the parties may request that the consultant make a follow up observation of the child. If the parties do not agree to accept the recommendations of the consultant, then they retain their due process rights and may pursue other dispute resolution options.⁸⁸ SpedEx is described as “an ongoing, experimental project” and has limited resources; for the 2013-2014 school year, there was funding to provide assistance in 8 cases.⁸⁹

Facilitated IEP Meetings⁹⁰ are offered by the BSEA, also at no cost to parents or school districts.⁹¹ Either party can request a facilitator, though both parties have to agree to accept the facilitator’s services before one is

⁸³ *Id.*

⁸⁴ *Id.* The program is operated and the list of consultants maintained by an administrator selected by DESE. Currently, the administrator is a professor of special education at a local university.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See, e.g., Tracy G. Mueller, *IEP Facilitation: A Promising Approach to Resolving Conflicts Between Families and Schools*, 41 TEACHING EXCEPTIONAL CHILD. 60 (2009) (discussing facilitated IEP meetings generally and proposing “seven essential components of IEP facilitation”); CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., FACILITATED IEP MEETINGS: AN EMERGING PRACTICE (2004).

⁹¹ See *Facilitators for IEP Meetings*, BUREAU SPECIAL EDUC. APPEALS, <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/facilitated-iep-team-meeting.html> (last visited Mar 18, 2014). This website is the basis for all of the information reported in this paragraph.

assigned.⁹² The facilitators are impartial and trained to help parties conduct productive meetings in situations where there could be elevated potential for conflict.⁹³ In particular, the facilitator can assist the parties to “develop and follow an agenda; stay focused on the goal of developing an acceptable IEP; problem solve; resolve conflicts that arise during the meeting; maintain open communication; clarify issues; and timely complete the meeting.”⁹⁴ In 2013, the BSEA conducted 140 Facilitated IEP meetings statewide.

The BSEA also offers an Advisory Opinion process,⁹⁵ available only in cases in which a hearing request has already been filed.⁹⁶ This non-required option originated in Massachusetts and is now offered in several other states.⁹⁷ The process is designed to help resolve disputes by allowing parties to make a brief presentation of their respective cases to an impartial hearing officer, who then issues a truncated, non-binding opinion the same day.⁹⁸ Participation is voluntary and the BSEA encourages parties to consult with each other and submit a joint request.⁹⁹ Five days prior to the Advisory Opinion hearing, parties may submit documents they would like the hearing officer to review and identify up to two witnesses they plan to call at the hearing.¹⁰⁰ In order to keep the process brief, the Advisory Opinion hearing itself is subject to strict timelines—each party is allocated a total of one hour to present its case.¹⁰¹ During the first part of the hearing, each party is allocated forty-five minutes for witness presentation, during which time

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ The statute that establishes the BSEA explicitly lists “advisory opinion procedures” as a method of alternative dispute resolution that the Bureau may provide. MASS. ANN. LAWS ch. 71B, § 2A(a).

⁹⁶ See HEARING RULES, *supra* note 57, at 9.

⁹⁷ See CTR. FOR APPROPRIATE DISPUTE RESOLUTION IN SPECIAL EDUC., BEYOND MEDIATION: STRATEGIES FOR APPROPRIATE EARLY DISPUTE RESOLUTION IN SPECIAL EDUCATION 25 (2002) [hereinafter BEYOND MEDIATION] (describing the advisory opinion process used in Connecticut and the “early neutral evaluation” process used in New Hampshire).

⁹⁸ See HEARING RULES, *supra* note 57, at 9–10. See also *Advisory Opinion Process*, BUREAU SPECIAL EDUC. APPEALS, <http://www.mass.gov/anf/hearings-and-appeals/bureau-of-special-education-appeals-bsea/advisory-opinion-process.html> (last visited Mar. 18, 2014). All of the information in this paragraph is adapted from these sources.

⁹⁹ See *id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 10.

neither party is allowed to ask questions of the witnesses; the party who filed the underlying hearing request presents first.¹⁰² In the second part of the hearing, each party is given fifteen minutes to elaborate on its case further and to ask questions of any witness.¹⁰³ Many of the formalities of a traditional due process hearing are not observed: the witnesses do not testify under oath; the proceeding is not recorded; and the hearing officer's opinion is kept confidential.¹⁰⁴ Once the process is complete, the parties may agree to accept the opinion of the hearing officer (and may agree in advance to make the opinion binding if they choose), or they may proceed to a full due process hearing with a different hearing officer, which should be scheduled to occur thirty days following the Advisory Opinion process.¹⁰⁵ Ironically, given that it originated here, this process is very rarely used in Massachusetts.

III. THE BSEA SETTLEMENT CONFERENCE

In addition to the non-required dispute resolution options described above, the BSEA has also pioneered an additional dispute resolution mechanism called the Settlement Conference. Though the Settlement Conference is not statutorily defined, the statute that establishes the BSEA explicitly grants it permission to offer Settlement Conferences as a form of alternative dispute resolution.¹⁰⁶ As defined by the BSEA, the Settlement Conference is a voluntary dispute resolution process available to litigants after a hearing request has been filed, affording parties a final opportunity to resolve their dispute through the administrative agency without proceeding to a due process hearing.

As part of an ongoing effort to explore innovative dispute resolution options, the Settlement Conference was piloted approximately 10 years ago. The theory underlying the development of the Settlement Conference was that the opportunity for an informed, neutral case assessment would facilitate resolution and avert the need for hearing in a significant number of cases. The intent of the Settlement Conference is to offer parties an informal, non-

¹⁰² See *Advisory Opinion Process*, *supra* note 98.

¹⁰³ *Id.*

¹⁰⁴ While the *Hearing Rules* indicate that the hearing officer's opinion should be in writing, the BSEA website, updated more regularly than the *Rules*, indicates that the opinion shall be verbal. This change was made to address the possibility of compromising the confidentiality of the opinion if presented in a written document. See *HEARING RULES*, *supra* note 57, at 10; *Advisory Opinion Process*, *supra* note 98.

¹⁰⁵ See *HEARING RULES*, *supra* note 57, at 9.

¹⁰⁶ MASS. ANN. LAWS ch. 71B, § 2A(a).

THE SETTLEMENT CONFERENCE

contentious forum in which the strengths and vulnerabilities of their respective positions can be assessed by an experienced neutral facilitator with no stake in the outcome. The ambitious goal of the process is not only to help the parties reach an agreement-in-principle, but also to draft and execute a binding settlement agreement “day of”, that is, at the close of the conference. Thus, when successful, the Settlement Conference enables parties to resolve their disputes without the expense or stress inherent in a formal due process hearing. The Settlement Conference affords finality at the end of the day, rather than delaying closure for the many months it often takes for full adjudication through a due process hearing.

A. Four Criteria for Settlement Conferences

The BSEA does not conduct Settlement Conferences in all cases where hearing requests have been filed. Currently, four criteria must be met in order to access the Settlement Conference process: (1) the parties must voluntarily agree to participate; (2) a hearing request must already have been filed; (3) the hearing officer assigned to the matter must endorse the Settlement Conference as efficacious given the case presentation; and (4) both parties must be represented by counsel.

1. Agreement to Participate

Like the other alternative dispute resolution options offered in Massachusetts—the SpedEx Program, the Facilitated IEP Meeting, and the Advisory Opinion—the parties must jointly agree to participate in the Settlement Conference. This is one of several features that makes the Settlement Conference, and all of the other alternative dispute resolution options, different from the statutorily prescribed resolution session.¹⁰⁷

2. Hearing Request Filed

The requirement that a hearing request has been filed prior to a Settlement Conference is rooted in the notion that in order for the conference facilitator to be able to offer an informed case assessment, the case has to be “fully evolved;” that is, the facilitator must be able to consider the gist of the evidence that would ultimately comprise the record were the case to go to

¹⁰⁷ See 20 U.S.C. § 1415(f)(1)(B)(i)(IV). See also Edwards, *supra* note 17, at 150–53 (discussing “resolution sessions as mandatory negotiation”).

hearing. Toward this end, parties are required to furnish documents in advance of the proceeding. Generally, the parties are encouraged to limit the documents to pleadings, recent evaluations, experts' recommendations, current progress reports, recent IEPs, and evidence of any significant procedural anomalies. The submission should give the facilitator a thorough overview of the case the parties intend to present at hearing.

3. *Hearing Officer Endorsement*

Since there may be some disputes that are less amenable to resolution through the Settlement Conference process than others, the assigned hearing officer (who has presumably reviewed the hearing request and the response, and has presided over a telephone conference call between the parties¹⁰⁸) is consulted as to the likely efficacy of utilizing the process in a given case. (In practice, there has not, to date, been any case before the BSEA in which the parties sought a Settlement Conference and the assigned hearing officer did not endorse their participation in the process.)

4. *Representation by Counsel*

In its early years, there was no requirement that parties be represented by counsel in order to participate in the Settlement Conference process. Over the course of several years of implementation of the three-criterion model, an issue emerged with respect to unrepresented litigants *vis a vis* accomplishing one of the primary goals of the settlement process, namely, execution of a settlement agreement at the close of the conference. By their very nature, settlement agreements, as contracts, typically entail legal boilerplate, including both general releases and specific waiver language. As a result, even in cases where the process was successful in achieving agreement on disputed substantive issues, there was often reluctance on the part of *pro se* parties to sign a binding contract because they were unfamiliar with and understandably wary of the waiver and release language that was included. Thus, after having spent a considerable amount of time getting to "yes" on all substantive matters, the Settlement Conference would end with no agreement. This scenario led to adoption of the fourth criterion of representation by counsel.

¹⁰⁸ See *supra* note 63.

B. Settlement Conference Procedure

In cases that meet the four criteria, either of the parties may initiate a request for a Settlement Conference (by phone or email) to the BSEA Director. The conference is then scheduled at a time that is mutually agreed upon by all parties and typically takes place at the BSEA offices (though the parties and the facilitator can agree to hold the conference in an alternative location).

The Settlement Conference is designed to be an informal, low key process, toward the ends of diffusing anxiety, reducing tension and creating a comfortable forum in which to exchange information and explore resolution. The Settlement Conference generally begins with a joint session, during which each party has the opportunity, if he or she so elects, to make a brief position statement. Unlike a hearing, the session is not recorded and participants are not under oath when making their presentations. Because the facilitator has already read the pleadings and other submissions, it is not necessary for counsel to restate information or arguments included therein; oral presentations are therefore generally kept to a minimum. Participants are given an opportunity to present relevant information that was not included in their submissions, and to expand upon or clarify information in the documents, if necessary. The facilitator presiding over the Settlement Conference asks clarifying questions based upon his or her review of the submissions. While attorneys and experts (if any) are instructed to keep their presentations brief, the BSEA strongly encourages parents to present their personal perspective and current concerns. Given the highly charged, emotional nature of the disputes presented in special education due process proceedings, the value to the parties (particularly parents) of this catharsis—of having the opportunity to be “heard” by a neutral authority in a non-threatening setting, of having their “day in court”—cannot be overstated.¹⁰⁹ In fact, very often substantive discussions regarding settlement cannot even begin in earnest until this emotional hurdle has been cleared.

Once the joint session is completed, the facilitator separates the parties into different rooms and caucuses with each,¹¹⁰ candidly presenting her or his analysis of the case, including an assessment of the strengths and vulnerabilities of the respective positions and how the parties would likely fare at hearing. Such *ex parte* communication is permissible in the context of

¹⁰⁹ For further discussion of this point, see *infra* Part IV.C. at 48.

¹¹⁰ This kind of “shuttle diplomacy” has been used elsewhere as part of special education dispute resolution processes. See, e.g., BEYOND MEDIATION, *supra* note 97, at 24 (describing “Shuttle Mediation” that has been employed in California).

the settlement process, albeit wholly inappropriate in the context of a due process hearing. Similarly, since financial considerations are often a significant factor impacting the possibility of resolution, discussions about the financial implications of the case, as well as monetary offers and counteroffers are permissible at a Settlement Conference, where they would never be considered as part of a due process hearing.¹¹¹ The parties, with assistance and input from the facilitator, proffer offers and counteroffers and, if a resolution is reached, an agreement is drafted and executed.¹¹²

Nothing that occurs at a Settlement Conference (including conversations, offers, written submissions, and the agreement, if one is reached) is shared by the parties or by the facilitator with the assigned hearing officer.¹¹³ The moving party simply submits a written withdrawal of the hearing request in the event of an agreement¹¹⁴ and, if no agreement is reached, the parties proceed to hearing in the normal course.

C. Settlement Conference Distinguished from Mediation

The Settlement Conference is sometimes confused with mediation by those new to the process. In fact, the terms are often used interchangeably. As should be apparent from the foregoing discussion, however, the two

¹¹¹ See 20 U.S.C. § 1415(h)(3)(E)(i) (“[A] decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education”).

¹¹² The BSEA hearing officers differ on the question of whether settlement agreements reached privately by the parties—whether through participation in a Settlement Conference or otherwise—are enforceable at the BSEA. See, e.g., *In re Worcester Pub. Sch.*, BSEA No. 1302473 (Mass. Bureau Special Educ. Appeals Jan. 23, 2013) (declining to enforce a settlement agreement reached by the parties through a BSEA Settlement Conference); *In re Peabody Pub. Sch.*, BSEA No. 09-6506 (Mass. Bureau Special Educ. Appeals June 25, 2009) (enforcing the terms of a settlement agreement reached through a BSEA Settlement Conference). The IDEA provides that settlement agreements reached through mediation or through the resolution session are enforceable in state and federal court. 20 U.S.C. § 1415(e)(2)(F)(iii); 20 U.S.C. § 1415(f)(1)(B)(iii)(II).

¹¹³ The school district is not precluded from proffering a 10 day written offer that includes the same components as an offer made but not accepted during the Settlement Conference for purposes of reducing an award of attorneys’ fees pursuant to 20 U.S.C. § 1415(i)(3)(D) (prohibiting the awarding of fees to parents’ attorneys for services performed subsequent to a written offer of settlement where such offer is made at least 10 days before hearing and where any relief ultimately obtained at hearing is deemed not to be more favorable than the relief promised in the written offer).

¹¹⁴ See HEARING RULES, *supra* note 57, at 23.

THE SETTLEMENT CONFERENCE

processes differ significantly and should be considered as separate and distinct options on the alternative dispute resolution spectrum. We briefly review some of the most notable differences.

First, while mediation can be requested at any time during the pendency of a dispute, the vast majority of mediations are held in cases where no hearing has yet been requested. In stark contrast, Settlement Conferences are only held in cases in which a hearing request has already been filed.

Second, given the fact that litigation has often not commenced at the time a mediation occurs, it is also less common (and, in fact, discouraged) for lawyers to participate in a mediation, whereas they are currently required participants in a Settlement Conference.

Third, mediators do not routinely read documentary evidence prior to conducting a mediation, although they may have a copy of the disputed IEP prior to convening the session. The Settlement Conference facilitator, on the other hand, reads robust documentary submissions prior to the conference so as to be familiar with the evidence that would be submitted as part of the record were the case to go to hearing.

Fourth, the primary focus of the Settlement Conference is case assessment—providing the parties an opportunity to hear an assessment of the legal merits of their case from an attorney with significant legal experience in special education matters. And the primary goal of the Settlement Conference is to secure a legally binding agreement on the issues(s) in dispute as reflected in a pending hearing request. To some degree, it is important for the parties to leave a Settlement Conference feeling that they have achieved an agreement that is at least reasonably justified under the law. While there may sometimes be a derivative benefit of improving the relationship between the parties, this is not the focus of the Settlement Conference process. In contrast, while resolving the underlying educational dispute is certainly one of the major goals of mediation, it is usually not the only goal, and “success” in mediation is not necessarily defined by reference to the law or legal concepts.

The aforementioned examples, which are not exhaustive, evidence that the two processes have different goals and utilize different techniques, thereby also requiring different skill sets in their facilitators. The salient point is that states considering implementation of the Settlement Conference process should not be concerned with a redundancy of services or a potential “turf war” with mediation. Both processes are valuable and offer unique benefits to parents and school districts.

D. Success of the Settlement Conference

There have been an average of seventy-eight Settlement Conferences conducted per year over the last five years. According to data maintained by the BSEA, approximately 85.7% settle via an agreement executed at the conclusion of the Settlement Conference.¹¹⁵ This figure does not account for those cases in which a written agreement was executed subsequent to the conference, owing to the difficulty of capturing and tracking such information.¹¹⁶ A conservative estimate is therefore that, on average, approximately sixty-seven cases per year settle as a result of the Settlement Conference process. Comparing this number with the average annual number of due process decisions issued by the BSEA over the past ten years—forty-one decisions per year¹¹⁷—highlights the value of the Settlement Conference process with respect to overall agency operation, and its contributory value in ensuring compliance with federal timelines.¹¹⁸

E. Ongoing Evolution of the Settlement Conference

The adapted four-criterion model described above has been successfully implemented for many years and continues to date. Because the Settlement Conference has enjoyed great success and is beneficial to parties and state agency alike, some have argued that it should be offered to all litigants, whether or not represented by counsel.¹¹⁹ Accordingly, the BSEA has begun exploring options for making the Settlement Conference available to unrepresented parties (and those represented by lay advocates) without

¹¹⁵ Interestingly, perception tracks reality here—attorney respondents to our survey estimated on average that 85.4% of the cases they have taken to Settlement Conferences settled on the day of the conference. See *infra* Part IV.C.

¹¹⁶ Respondents to our survey reported that an average of 29.4% of the cases they have take to Settlement Conferences settled subsequent to the day of the conference. See *infra* Part IV.C.

¹¹⁷ See Table 1, *supra* Part II.B.

¹¹⁸ According to federal regulations, hearing officers must render their decisions in IDEA matters, and mail a copy of the decision to each of the parties, not later than 45 days after the expiration of the 30-day resolution period that commences when a party files a complaint. See 34 C.F.R. § 300.515(a).

¹¹⁹ A Fourteenth Amendment challenge has recently been filed in U.S. District Court for the District of Massachusetts alleging that the BSEA's failure to offer Settlement Conferences to unrepresented litigants constitutes a violation of the Equal Protection Clause of the U.S. Constitution. *Student v. Pentucket Reg'l Sch. Dist.*, No. 1:13-cv-11414-DPW (D. Mass. filed June 10, 2013).

THE SETTLEMENT CONFERENCE

compromising its effectiveness. We briefly describe here the most promising of these options.

First, a description of the Settlement Conference process would be generally disseminated, clearly indicating (a) that there is an expectation that, if agreement is reached on the substantive issues, a settlement agreement will be written and signed at the close of the conference and (b) that settlement agreements typically entail waivers of rights and releases. Thereafter, unrepresented parties who pursue the process would be provided typical “boilerplate” waiver and release language for review in advance of the Settlement Conference. This would be accompanied by a notice reminding potential participants of the expectation that if an agreement is reached on the merits, the parties will execute a settlement agreement at the conference. Parties who believe the release/waiver language would pose an insurmountable impediment to executing an agreement would be able to opt out of participating in a Settlement Conference.¹²⁰

IV. ATTORNEYS’ OPINIONS OF THE SETTLEMENT CONFERENCE AS A DISPUTE RESOLUTION OPTION

The statistics maintained by the BSEA suggest that the Settlement Conference is both a frequently utilized and highly successful form of dispute resolution in Massachusetts. Anecdotally, the Settlement Conference also appears to enjoy a positive reputation among members of the Massachusetts special education bar. In order to test these presumptions and to learn more about the underlying reasons for the apparent effectiveness of this dispute resolution mechanism, we developed a brief survey instrument and distributed it to 118 attorneys who practice special education law in Massachusetts. An email inviting participation in the survey was sent to every attorney listed in the BSEA’s database who has entered an appearance in a special education matter in recent years—attorneys who represent parents and students, attorneys who represent school districts, and attorneys who represent state agencies.¹²¹ The survey was designed to take

¹²⁰ In order to help ensure unrepresented parties have adequate understanding of these releases and waivers, this notice could also include a listing of attorneys who have indicated their willingness to review and explain the boilerplate language at no or low cost (assuming the willingness of the bar to provide this service).

¹²¹ Massachusetts law gives the BSEA jurisdiction over state agencies in certain circumstances: “The hearing officer may determine, in accordance with the rules, regulations and policies of the respective agencies, that services shall be provided by the department of children and families, the department of mental retardation, the department

approximately ten minutes to complete and we received responses from 78 attorneys, yielding a response rate of 66%. (See Table 3.) Respondents were informed that their responses would be anonymous and that aggregate results of the survey would be reported in this Article.¹²² In this Part, we begin by sharing our own perspectives—as an attorney who represents families and as an attorney who represents school districts—on the effectiveness of the Settlement Conference as a dispute resolution option for our clients. We then share the results of our survey, noting where there are similarities and differences in attorneys’ opinions depending on whom they represent.

Table 3

When you appear before the BSEA, whom do you typically represent?		
Parents or students (pro-bono clients)	17	22%
Parents or students (fee paying clients)	29	37%
School districts (as retained counsel)	21	27%
School districts (as in-house counsel)	9	12%
State agency*	2	3%
TOTAL	78	100%

* Given the small number of attorneys who represent state agencies before the BSEA, we do not report on their responses in this Article as their statistical significance would be dubious and because the identity of the respondents could be easily identified.

A. *The Perspective of a Families’ Attorney*¹²³

One of the primary benefits of the Settlement Conference for parents and students is that, unlike other forms of dispute resolution (particularly

of mental health, the department of public health, or any other state agency or program, in addition to the program and related services to be provided by the school committee.” MASS. ANN. LAWS c. 71B, § 3.

¹²² The survey instrument and invitation to participate are on file with the authors.

¹²³ This section is based on Prof. Gregory’s experiences representing low-income families in the Education Law Clinic at Harvard Law School. The experiences of families with greater financial resources may vary; accordingly, our survey disaggregates the responses of *pro bono* attorneys from those of attorneys with fee-paying clients in an attempt to learn about what some of these variations might be. See *infra* Part IV.C.

mediation), it enables them to derive bargaining power from the legal merit of their case.¹²⁴ Legal case assessment by an experienced attorney and former hearing officer, which is the Settlement Conference's defining feature, can work to equalize the power differential that otherwise usually exists between parents and school districts during earlier stages of the special education process.¹²⁵ Mediation does not offer this kind of merit-based negotiation, as mediators are not trained to assess the legal merits of a case and do not engage in the robust review of documentary evidence that is conducted by the Settlement Conference facilitator.¹²⁶ For many parents and students engaged in a protracted special education dispute, the Settlement Conference is the first time they have ever had someone in an authoritative position acknowledge the procedural and substantive violations that the school district may have committed. Executing a settlement agreement that remedies such violations can be a very empowering experience for families who have previously felt immobilized in their attempt to enforce their children's legal entitlement.

This points to another advantage of the Settlement Conference for parents and students, which is the emotional healing and psychological closure that it often provides.¹²⁷ In addition to obtaining substantive relief

¹²⁴ In this Article, we primarily use the term "families' attorney" because unlike, for example, "parents' attorney," it is more inclusive of the various clients who might pursue special education claims against school districts. The IDEA defines "parent" to include a natural, adoptive or foster parent; a guardian; an individual acting in the place of a natural or adoptive parent with whom a child lives; an individual legally responsible for a child; or an individual assigned to be an educational surrogate parent. 20 U.S.C. § 1401(23). Attorneys often represent each of these types of parents and also often represent students in special education matters. See Yael Zakai Cannon, *Who's the Boss?: The Need for Thoughtful Identification of the Client(s) in Special Education Cases*, 20 AM. U. J. GENDER SOC. POL'Y & L. 1 (2011) (discussing various models of client representation in special education cases).

¹²⁵ See, e.g., Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 180 (2005) (noting the "specter of substantive bargaining inequality" that the IEP process represents for many parents and students).

¹²⁶ See *supra* Part III. C. See also COLKER, *supra* note 15, at 101–02 (noting that Congress' decision not to allow parents to recover attorneys' fees for mediation means that many are unrepresented in this process and that resulting agreements are more likely to "simply reflect the power imbalance between parents and school districts" than to approximate a child's actual legal entitlement).

¹²⁷ The comment of one families' attorney who responded to our survey poignantly illustrates this advantage: "My clients have received results that they are extremely happy about, *most often crying as they leave*" (emphasis supplied; response on file with the authors).

that feels justified under the law, parents and students also often experience the catharsis that comes from having their “day in court.” Though the Settlement Conference is designed to be informal, the presence of the BSEA facilitator conveys an important sense of “official-ness” that is not present in mediations nor, certainly, in settlements that are achieved through negotiations outside the BSEA between the respective attorneys. The two-part structure of the Settlement Conference—joint presentation where each party voices its side of the story followed by separate caucuses and “shuttle diplomacy”—allows parents and students to express their frustration publically to a neutral authority figure without having any perceived hostility short circuit the subsequent process. For parents and students who are not comfortable giving voice to their experiences in the joint session, the private discussions with the facilitator provide an additional, less stressful, opportunity to communicate their concerns candidly. This kind of facilitated communication allows both parties to speak openly and honestly without having emotional tensions derail the negotiation.

In terms of the negotiation process itself, the confidentiality of the Settlement Conference allows the parties to be transparent about their interests and encourages the facilitator to be creative and flexible in helping the parties reach a resolution. While the negotiation is grounded in a legal assessment of the parties’ respective positions, it is not straight jacketed by the law. Because a Settlement Conference negotiation takes place outside the strictures that govern a hearing officer’s decision making in a due process hearing, financial interests—which are often the stumbling block to resolution—can be discussed openly. In addition, sometimes parents and students have interests—like receiving an apology from the school district—that are extremely important as elements of restorative justice, but that are not cognizable as requests for relief through a due process hearing. The facilitator, who has the benefit of having observed hundreds of successful settlements, has the opportunity to suggest creative solutions to the parties that have proven successful in the past that they might never think of on their own and that would not be possible through a hearing.

Of course, the empowerment that can derive from enforcing the law on behalf of one’s child and the emotional weight that can be lifted by resolving a long dispute are both also possible outcomes for parents who prevail at the end of a due process hearing. The obvious significant advantage of the Settlement Conference, where the expectation is that resolution will be reached and a final agreement executed at the end of the day, is that parents can achieve these results much more quickly and with far fewer resources expended—both financial and emotional. In addition, while mending a damaged relationship between the parties is not the primary objective of a

Settlement Conference, the likelihood of such reconciliation is perhaps greater where parents perceive a voluntary capitulation by the school district than where they feel the district has held tight to its position until the bitter end.

Finally, in addition to these positive benefits for parents and students, the Settlement Conference also has advantages for attorneys who represent them. The opportunity to receive feedback from a facilitator who knows the law well and who has reviewed the most relevant documentary evidence serves as an important reality check that is invaluable in helping an attorney advise his or her clients about whether or not to accept an offer made by the school district. Furthermore, this feedback can also be an important reality check for clients; sometimes parents and students have unrealistic expectations—like receiving relief for a procedural violation that, while glaringly inappropriate, is nevertheless legally *de minimis*—and the facilitator's feedback can serve as helpful reinforcement to the advice the attorney may already have provided the family on these issues.

For attorneys who represent low-income clients, a significant advantage of the Settlement Conference is that resolving cases more quickly and without the time and energy required by a full due process hearing allows for the representation of more clients. There are also, however, two particular downsides that are important to note; both are true not just of Settlement Conferences, but of settling cases generally. First, settling the case precludes the awarding of attorneys' fees to families' attorneys.¹²⁸ Second, for cases

¹²⁸ The IDEA provides for a parent who is a "prevailing party" in a special education proceeding to recover attorneys' fees from the defendant school district. 20 U.S.C. § 1415(i)(3)(B). The Supreme Court has held, however, that the term "prevailing party" does not include "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a *voluntary* change in the defendant's conduct." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) (emphasis supplied). While *Buckhannon* involved an action under the Americans with Disabilities Act and the Fair Housing Amendments Act, its holding has been applied by federal circuit courts to IDEA actions. See, e.g., *T.D. v. Lagrange Sch. Dist.*, 349 F.3d 469 (7th Cir. 2003); *John T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003); *J.C. v. Reg'l Sch. Dist.*, 278 F.3d 119, 124–25 (2d Cir. 2002). As a result, parents who settle their IDEA cases are not entitled to pursue an award of attorneys' fees in court. Our anecdotal experience is that this absence of the availability of fees in all but the small number of cases that proceed to a full hearing has resulted in fewer attorneys who are able and/or willing to represent parents and students *pro bono* or on a contingent-fee basis, greatly reducing the availability of legal representation to low-income families overall. For a discussion of the effect of *Buckhannon* on the resolution of special education disputes, see Lynn M. Daggett, *Special Education Attorneys' Fees: of*

that hold potential precedential value—often a significant focus of legal services and child advocacy organizations who provide *pro bono* representation—the lack of a written decision from the Settlement Conference diminishes the likelihood that a case will catalyze systemic change that could stand to benefit additional students.

*B. The Perspective of a School Districts' Attorney*¹²⁹

School districts are most often on the receiving end of due process hearing requests filed by parents who are dissatisfied with the special education services and/or placement that have been proposed for their children. As such, school districts find themselves in the position of having to defend their programs and put forth evidence to rebut expert testimony parents have obtained prior to filing for due process. It is rare that a school district will evaluate its case and find no flaws, either substantive or procedural. This is especially so when parents, represented by experienced counsel, have prepared thoroughly for litigation through the engagement of experts who have not only evaluated the student and read his or her school record but who have also observed the student in his or her public school placement.

Faced with such a scenario, a school district is wise to evaluate its case objectively. The risk to a school district of proceeding to a due process hearing with a case that has significant shortcomings is high, in large part due to the IDEA's provision awarding attorney's fees to prevailing parents.¹³⁰ To mitigate this risk while at the same time obtaining objective case analysis, school districts often participate very willingly in Settlement Conferences.

Buckhannon, *the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute*, 8 U.C. DAVIS J. JUV. L. & POL'Y 1 (2004); Stefan R. Hanson, Buckhannon, *Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 B.Y.U. EDUC. L.J. 519 (2003); Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 65 OHIO ST. L.J. 357 (2004).

¹²⁹ This section is based on Attorney St. Florian's experiences representing school districts as retained counsel. The perspective of school districts with in-house counsel may vary; accordingly, as with family-side attorneys, our survey disaggregates the responses of attorneys who represent districts as retained counsel from those of attorneys who work in-house for school districts in an attempt to capture any such variations. See *infra* Part IV.C.

¹³⁰ See 20 U.S.C. § 1415(i)(3)(B).

THE SETTLEMENT CONFERENCE

Given that one of the primary objectives of a Settlement Conference is to reach resolution expeditiously, saving both time and financial resources, it is best if the decision to proceed to a Settlement Conference is made shortly after a due process hearing request is filed. If the parties wait, for example, until after discovery has been completed, not only is it less likely that both parties will agree to a Settlement Conference, but it is also likely that a great deal of time will have been expended unnecessarily. The challenge with this can be that a school district may feel it is coming from a position of weakness if it offers to participate in a Settlement Conference as soon as the due process hearing request is filed and, in fact, there is some truth to this. While parents should not infer that the school district is prepared to meet all their demands, the message conveyed in suggesting a Settlement Conference is clearly that the school district is interested in settlement.

Neither party should participate in a Settlement Conference unless it wants to settle its case. This means give and take on both sides. As self-evident as this seems, counsel for both parties are well advised to speak very clearly about this expectation to their clients prior to agreeing to a Settlement Conference. Clients who are not familiar with the Settlement Conference process may think it is a forum to receive feedback on the merits of their position and then somehow convince the opponent to back down or even withdraw their hearing request once they have heard how strong the case is for the other side. *This happens very infrequently.* While case analysis is a major component of a Settlement Conference, the end goal is to settle the case, even if strengths have been identified. What parties need to understand is that strengths increase negotiating leverage and may lead to a more favorable agreement, but they will rarely, if ever, lead the moving party to withdraw its claims regardless of how weak it may have been told its case is. This is particularly true where parents have taken the financial risk of unilaterally placing their child in a private school prior to filing for due process.¹³¹

The Settlement Conference facilitator reviews records submitted by both parties so as to begin the conference already having a strong handle on the case and the issues in dispute. School districts should provide pertinent records without including documents that are of little or no relevance. Once records have been sent, the question is who to bring to the Settlement

¹³¹ The IDEA allows parents to seek reimbursement from school districts for expenses they incur in unilaterally placing their child in a private school program. 20 U.S.C. § 1412(a)(10)(C)(ii) (allowing courts or hearing officers to order reimbursement upon a finding that the school district had not made a free appropriate public education available to the student in a timely manner).

Conference. From the school district's perspective, the Director of Special Education, who has the authority to allocate district resources and make decisions on behalf of the district, must be present. However, the Director is probably not the best person to describe the student and the progress that he or she has been making in the district's program. It will also be important to have present teachers and related services providers who have direct working knowledge of the student and who will, presumably, be in a position to rebut the reports of the parents' experts. Having said this, it is generally not advisable for the school district to bring the entire IEP Team to the Settlement Conference. One or two carefully selected members in addition to the Director are usually sufficient.

School districts' counsel should adequately prepare staff for a Settlement Conference. Often, this starts with allaying fears associated with testifying and cross-examination. Assuring everyone that this is essentially an informal process with no sworn testimony usually goes a long way in terms of reducing anxiety. The process itself is much less nerve wracking then the anticipation. At the same time, staff should be advised that this is a significant opportunity in the process to persuade the facilitator of the staff's expertise and credibility which, in turn, leads to greater negotiation leverage. Sometimes, it is helpful to distinguish what will be presented in the joint session from what will be discussed during the *ex parte* caucus. Anecdotal information, for example, such as a contentious history between the family and school district, is usually best left to the caucus session. Antagonizing the other party during the joint session is not the best way to set the stage for productive resolution. In fact, occasionally the parties will agree to forego the joint session altogether. This usually occurs when the parties do have a contentious relationship and their counsel agree that it is best to keep everyone separated.

Sometimes parties settle cases because it is too risky to go to hearing. Other times, parties settle cases because the negotiated deal is favorable from a cost/benefit analysis. Regardless of the reason, it is natural to walk away from a Settlement Conference not feeling fully vindicated. By definition, there are no winners and losers at a Settlement Conference—only parties that hopefully feel as though they made the best decision in light of the circumstances. When a cost/benefit analysis is the driving force behind an eventual settlement, staff may be left feeling confused as to why the district did not choose to take the case to hearing, especially if the facilitator gives positive feedback to the district on the work it has done with the student. It will be important for counsel to assist the Director in explaining the legal ramifications that may have led to a settlement. Often, staff members who have worked with a student for a period of time will feel a personal

THE SETTLEMENT CONFERENCE

connection and may experience feedback as criticism. In addition to reaching settlement, a secondary but still very important goal should be for everyone to leave the Settlement Conference feeling heard and having understood the rationale behind why and how a case settled.

The Settlement Conference is most effective when it concludes with a fully executed agreement on the day of the conference. It is typical that district representatives may feel some level of ambivalence through the process; there is often the lingering thought that, if the case had gone to hearing, one might have gotten a better result than what was negotiated at the Settlement Conference. This doubt can fester and result in failed negotiations unless, once there is agreement on the terms, those terms are reduced to writing and promptly signed by both parties. As anyone who has been through a negotiation knows, the devil is in the details. Often, more time is spent writing and agreeing to the terms of an agreement than actually negotiating the terms in the first place.

In all, Settlement Conferences are an excellent way of resolving most special education cases. It is the unusual situation when a school district feels so confident of achieving success at the due process hearing that there is no interest in settlement. At the same time, a case needs to present with the possibility of compromise. So, for example, the typical case involving a parent's unilateral placement in a private school always offers the option of a cost share between the parents and school district.¹³² The power of a Settlement Conference is the ability of the facilitator to have *ex parte* discussions and talk about finances, an otherwise prohibited subject under the IDEA. On the other hand, if the dispute is over, for example, whether or not the student should have a designated 1:1 aide in school, the Settlement Conference may not be the best option because this may be a more black and white question where there is very little room for compromise. These are factors to consider before making the decision to participate in a Settlement Conference.

Once carefully assessed, though, if the decision is made to proceed to a Settlement Conference with the understanding that a successful negotiation will require give and take from both sides, the chances of reaching resolution in a manner that will be satisfactory to those involved is extremely high.

¹³² Of course, sharing the cost of such a placement is not a possibility for parents without means, but for this very reason it is unlikely that these parents will have been able to make a unilateral placement in the first place.

C. Evidence from a Survey of Massachusetts Special Education Attorneys

We report in this section the results from our survey. Specifically, we asked respondents questions about how frequently they practice before the BSEA, how many Settlement Conferences they have participated in, how satisfied or dissatisfied they and their clients are with the Settlement Conference, the reasons for their and their clients' satisfaction or dissatisfaction, and the factors they believe are critical for a Settlement Conference's success at resolving a dispute.

As might be expected from the BSEA's data on parties' representation at hearing (see Table 2, *supra*), families' attorneys reported making fewer appearances before the BSEA in the past two years than did school districts' attorneys (an average of 10.73 and 16.30 appearances, respectively). (See Table 4a and Table 4b.) Similarly, there was a difference—albeit a smaller one—in the average total number of Settlement Conferences each group has participated in (7.02 for families' attorneys and 9.97 for school districts' attorneys). We found even greater differences are between the subgroups of attorneys on each side. Families' attorneys with fee-paying clients both appeared at the BSEA and participated in Settlement Conferences much more frequently (an average of 14.17 appearances and 9.21 Settlement Conferences) than did families' attorneys with *pro bono* clients (an average of 4.07 appearances and 2.64 Settlement Conferences). A similar discrepancy exists between retained school districts' attorneys (an average of 18.29 appearances and 12.20 Settlement Conferences) and in-house school districts' attorneys (an average of 11.67 appearances and 5.00 Settlement Conferences). These data suggest that attorneys in private practice—on both the family side and school district side—are practicing before the BSEA and participating in Settlement Conferences at a greater rate than *pro bono* attorneys on the family side and public employees (in-house counsel) on the school district side (with families' *pro bono* attorneys having by far the lowest participation rate of the four subgroups). Interestingly, given these varying rates of participation, families' attorneys overall assessed a higher average percentage of their cases as being appropriate candidates for a Settlement Conference (75.81%) than did school districts' attorneys (63.70%), and the assessment of families' *pro bono* attorneys (66.67%) was higher than both school district subgroups (65.50% for retained counsel and 58.57% for in-house counsel).

THE SETTLEMENT CONFERENCE

Table 4a
Average Frequency of Appearances at the BSEA and Participation in
Settlement Conferences
(Families' Attorneys)

	Pro bono clients (n=17)	Fee-paying clients (n=29)	Combined (n=43)
In the past 2 years, approximately how many cases have you appeared in before the BSEA?	4.07	14.17	10.73
Approximately how many BSEA Settlement Conferences have you participated in?	2.64	9.21	7.02
What percentage of cases in which you appear before the BSEA would you estimate are appropriate candidates for a BSEA Settlement Conference?	66.67%	80.71%	75.81%

Table 4b
Average Frequency of Appearances at the BSEA and Participation in
Settlement Conferences
(School Districts' Attorneys)

	Retained counsel (n=21)	In-house counsel (n=9)	Combined (n=29)
In the past 2 years, approximately how many cases have you appeared in before the BSEA?	18.29	11.67	16.30
Approximately how many BSEA Settlement Conferences have you participated in?	12.20	5.00	9.97
What percentage of cases in which you appear before the BSEA would you estimate are appropriate candidates for a BSEA Settlement Conference?	65.50%	58.57%	63.70%

Table 5a
Average Time of Settlement and Percentage of Successful
Agreements
(Families' Attorneys)

Approximately what percentage of the time has participation in a BSEA Settlement Conference resulted in an agreement...	Pro bono clients (n=17)	Fee-paying clients (n=29)	Combined (n=43)
...that settled the case <i>on the same day</i> as the Settlement Conference?	55.38%	87.86%	77.56%
...that settled the case <i>subsequent to the day of</i> the Settlement Conference?	35%	30%	31.74%
...with which your client was pleased?	78.46%	83.93%	82.2%

Table 5b
Average Time of Settlement and Percentage of Successful
Agreements
(School Districts' Attorneys)

Approximately what percentage of the time has participation in a BSEA Settlement Conference resulted in an agreement...	Retained counsel (n=21)	In-house counsel (n=9)	Combined (n=29)
...that settled the case <i>on the same day</i> as the Settlement Conference?	93.68%	87.14%	91.92%
...that settled the case <i>subsequent to the day of</i> the Settlement Conference?	30%	20%	27.86%
...with which your client was pleased?	81.05%	71.43%	78.47%

Consistent with the data recorded by the BSEA, attorneys from all four subgroups reported that the vast majority of cases they take to Settlement Conferences end up settling—primarily on the day of the conference, as is the expressed goal of the process, but also subsequent to the conference. (See Table 5a and Table 5b.) School districts' attorneys reported that an average of 91.92% of the cases they took to a Settlement Conference settled on the day of the conference and families' attorneys reported a lower, but still significant, average of 77.56% of cases settling the same day. On the families' side, *pro bono* attorneys reported a substantially lower percentage (though still a majority) of cases settling the same day (55.38%) than did attorneys of fee-paying clients (87.86%). It is important to keep in mind that *pro bono* attorneys reported participating in far fewer Settlement Conferences than did attorneys with fee-paying clients, meaning that having only one of their cases not settle

THE SETTLEMENT CONFERENCE

on the day of the conference could skew the average percentage disproportionately.¹³³ Nonetheless, this data does raise an important question about why *pro bono* attorneys and their (presumably low-income) clients were less likely to leave the Settlement Conference with a fully executed agreement. Importantly, among the four subgroups of attorneys, these attorneys did report the highest average percentage of cases that settled subsequent to the day of the conference (35%), so the vast majority of their cases appear to be settling, albeit at a later point in time. One possible explanation is that non-fee-paying families may not feel the financial pressure to settle on the day of the conference that fee-paying clients do. Regardless of the reason, this apparently greater likelihood of delay in the settlement of cases for families' *pro bono* attorneys did not seem to affect substantially their perception of their clients' ultimate satisfaction with the resulting agreements; 78.46% of these attorneys reported that the Settlement Conference resulted in an agreement that pleased their clients, a percentage that was only slightly lower than that reported by families' attorneys with fee paying clients (83.93%) and retained school districts' counsel (81.05%) and higher than school districts' in-house counsel (71.43%).

Given this relatively high rate of settlement and the perception of high client satisfaction with resulting agreements, it is not surprising that attorneys in all four subgroups reported a high level of *attorney* satisfaction with the Settlement Conference process as an effective mechanism for dispute resolution in special education. (See Table 6a and 6b.) The percentage of attorneys reporting that they are "very satisfied" with the process was highly consistent among *pro bono* families' attorneys (77%), fee-receiving families' attorneys (79%), and retained school districts' counsel (79%), and a full 100% of in-house school districts' attorneys reported that they are "very satisfied." An interesting finding, however, is that only families' attorneys expressed any dissatisfaction with the process, albeit in small numbers. All school districts' attorneys reported that they were either "somewhat satisfied" or "very satisfied" with the process; none of them expressed neutrality or dissatisfaction. Small percentages of families' *pro bono* attorneys, however, reported that they were either "very dissatisfied" with (8%) or "neutral" about (15%) the Settlement Conference process, and small percentages of families' attorneys with fee-paying clients reported that they were either "somewhat dissatisfied" with (7%) or "neutral" about (3%) the process. Though these percentages are small, the fact that they are exclusively on the families' side is a phenomenon that warrants further investigation.

¹³³ One attorney's response to the survey seems to reflect this point: "The reason my percentage of unsettled cases is so high (50%) is because I have only been to four of them" (response on file with the authors).

Table 6a
Percent Satisfaction with the Settlement Conference
(Families’ Attorneys)

Overall, how satisfied are you with the BSEA Settlement Conference as an effective form of dispute resolution?	Pro bono clients (n=17)	Fee-paying clients (n=29)	Combined (n=43)
Very dissatisfied	8%	0%	2%
Somewhat dissatisfied	0%	7%	5%
Neutral	15%	3%	7%
Somewhat satisfied	0%	10%	7%
Very satisfied	77%	79%	79%

Table 6b
Percent Satisfaction with the Settlement Conference
(School Districts’ Attorneys)

Overall, how satisfied are you with the BSEA Settlement Conference as an effective form of dispute resolution?	Retained counsel (n=21)	In-house counsel (n=9)	Combined (n=29)
Very dissatisfied	0%	0%	0%
Somewhat dissatisfied	0%	0%	0%
Neutral	0%	0%	0%
Somewhat satisfied	21%	0%	15%
Very satisfied	79%	100%	85%

Of course, while the satisfaction of attorneys with the Settlement Conference process is extremely important, the ultimate test of this dispute resolution option is whether the disputing parties—families and school districts—are satisfied with it. Our survey therefore also asked respondent attorneys about their perceptions of their clients’ satisfaction with the process (in addition to how pleased they were with resulting agreements, as reported *supra*). (See Table 7a and Table 7b.) Interestingly, all four subgroups of attorneys reported perceived levels of client satisfaction that were lower than their own, though still relatively high. School districts’ retained counsel reported the lowest percentage of clients that are “very satisfied” with the Settlement Conference process (44%). Overall, though, both subgroups of school-side attorneys perceived almost all of their clients to be either “very

THE SETTLEMENT CONFERENCE

satisfied” or “somewhat satisfied” (94% for retained counsel and 100% for in-house counsel). Families’ attorneys reported perceived client satisfaction rates that were more distributed over the spectrum of choices though still heavily positive; *pro bono* attorneys perceived that 75% of their clients are either “very satisfied” or “somewhat satisfied” with the Settlement Conference process and for attorneys with fee-paying clients the figure is 89%. None of the four subgroups of attorneys perceived that any of their clients are “very dissatisfied” with the Settlement Conference process. While we should not necessarily assume attorneys’ perceptions of their clients’ satisfaction to be accurate, the noticeable discrepancies between respondents’ reports of their own satisfaction and that of their clients suggests at least that it is unlikely the attorneys were simply ascribing their own views to their clients.

Table 7a
Perceived Client Satisfaction with the Settlement Conference
(Families’ Attorneys)

Overall, how satisfied do you feel your clients are with the BSEA Settlement Conference?	Pro bono clients (n=17)	Fee-paying clients (n=29)	Combined (n=43)
Very dissatisfied	0%	0%	0%
Somewhat dissatisfied	8%	7%	8%
Neutral	17%	4%	8%
Somewhat satisfied	17%	14%	15%
Very satisfied	58%	75%	70%

Table 7b
Perceived Client Satisfaction with the Settlement Conference
(School Districts’ Attorneys)

Overall, how satisfied do you feel your clients are with the BSEA Settlement Conference?	Retained counsel (n=21)	In-house counsel (n=9)	Combined (n=29)
Very dissatisfied	0%	0%	0%
Somewhat dissatisfied	6%	0%	4%
Neutral	0%	0%	0%
Somewhat satisfied	50%	29%	44%
Very satisfied	44%	71%	52%

In addition to discovering *whether* families and school districts are satisfied with the Settlement Conference (at least as perceived by their lawyers), we also wanted to understand more about *why* their lawyers believe their clients to be satisfied. Based on our perceptions of why our own clients find the Settlement Conference to be beneficial, we gave respondents a list of possible perceived benefits and asked them to indicate the importance of each by assigning it a score between 1 and 10, with 10 being extremely important.¹³⁴ In Table 8a and Table 8b, we report the mean score for each possible benefit and also the ordinal rank for each benefit for each subgroup of attorneys. Unsurprisingly, the biggest discrepancy for both families' attorneys and school districts' attorneys was with respect to the Settlement Conference's reduced costs compared to litigation. The subgroups of attorneys whose clients do not have to pay them more to go to hearing—*pro bono* attorneys, whose clients do not pay them at all, and in-house counsel, who usually receive the same salary regardless of how much work they do on a particular matter—reported that this benefit was relatively unimportant to their clients (with a mean score of 3.00 and ordinal rank of 9th for the former and a mean score of 7.43 and ordinal rank of 7th for the latter).¹³⁵ The reverse was true for the other subgroups—fee-receiving families' attorneys and retained school districts' counsel—who each assigned a mean score of 9.00 to this benefit and reported it to be the number one perceived benefit for their clients. There seemed to be a relative degree of consensus among the various subgroups that the opportunity to resolve a matter promptly was one of the most important perceived benefits; *pro bono* attorneys ranked this first (with a mean score of 9.18) while families' attorneys with fee-paying clients and in-house school districts' counsel both ranked it second (with mean scores of 8.85 and 8.86, respectively) and retained school districts' attorneys ranked it fourth (with a mean score of 7.95). The opportunity to receive feedback on strengths and weaknesses of a case, the hallmark of the Settlement Conference, was also perceived as important to clients; families' attorneys overall ranked this benefit third (with a mean score of 7.95) and school districts' attorneys overall ranked it first (with a mean score of 8.73). The benefit perceived by both families' attorneys and school districts' attorneys to be the least important to their clients was the confidentiality of Settlement Conference negotiations (with mean scores of 5.69 and 6.88, respectively).

¹³⁴ We also provided the opportunity for respondents to list up to 3 "other" benefits their clients find important. Two respondents listed "skill of the facilitator;" one respondent listed "preservation of relationship" between the parties; and one respondent listed the opportunity to have "frank assessment of the case." Each of these respondents assigned their "other" benefit a score of "10."

¹³⁵ For a discussion of attorneys' fees, see *supra* note 128.

THE SETTLEMENT CONFERENCE

Table 8a
Average Importance of Settlement Conference Benefits
(Families' Attorneys)

On a scale of 1-10 (where 10 is extremely important and 1 is not at all important), please rate each of the following benefits of the BSEA Settlement Conference in terms of how important it is to your clients.	Pro bono clients (n=17) (mean and ordinal rank)	Fee-paying clients (n=29) (mean and ordinal rank)	Combined (n=43) (mean and ordinal rank)
Reduced costs compared to litigation	3.00 (9)	9.00 (1)	7.26 (7)
Reduced stress compared to litigation	7.82 (5)	7.22 (7)	7.39 (6)
Opportunity to receive feedback on the strengths and weaknesses of the case	8.18 (3)	7.85 (4)	7.95 (3)
Ability to discuss interests (like cost) that are not part of the due process hearing	6.18 (8)	6.85 (8)	6.66 (8)
Ability to generate creative solutions not possible through the due process hearing	7.73 (6)	7.70 (6)	7.71 (5)
Opportunity to resolve the matter promptly	9.18 (1)	8.85 (2)	8.95 (1)
Opportunity to have the client's concerns heard by a neutral authority figure	8.73 (2)	8.07 (3)	8.26 (2)
Presence of a neutral facilitator to defuse tension between the parties	8.18 (3)	7.59 (5)	7.76 (4)
Confidentiality of negotiations	6.70 (7)	5.31 (9)	5.69 (9)

We also wanted to ascertain respondents' opinions about what factors they believe to be particularly important to the success of a Settlement Conference. Here again we provided respondents with a list of factors, based on our own experiences, that might be perceived to be important to the success of the process and asked them to assign each factor a score on a scale of 1 to 10, with 10 being extremely important.¹³⁶ (See Table 9a and Table 9b.) All four subgroups of attorneys were uniform and unequivocal in their view that the skill of the facilitator is the most important factor in determining the success of a Settlement Conference; families' attorneys overall assigned this factor a mean score of 9.84 and school districts' attorneys overall assigned it a mean score of 9.73. Adequate preparation of the case by the attorneys and clients' realistic expectations of the

¹³⁶ We also provided the opportunity for respondents to list "other" factors they perceived to be important to the success of Settlement Conferences. One respondent listed "open-mindedness of the parties" as a factor and assigned it a value of "10."

risks of going to hearing were the second and third most important factors, respectively, with means scores over 8.0 for both families' and schools districts' attorneys. Relatively less important to both groups of attorneys was the quality of the relationship between the parties and the quality of the relationship between counsel; mean scores for these factors fell in the 5.5 to 6.5 range for both groups.

Table 8b
Average Importance of Settlement Conference Benefits
(School Districts' Attorneys)

On a scale of 1-10 (where 10 is extremely important and 1 is not at all important), please rate each of the following benefits of the BSEA Settlement Conference in terms of how important it is to your clients.	Retained counsel (n=21) (mean and ordinal rank)	In-house counsel (n=9) (mean and ordinal rank)	Combined (n=29) (mean and ordinal rank)
Reduced costs compared to litigation	9.00 (1)	7.43 (7)	8.58 (2)
Reduced stress compared to litigation	7.84 (6)	7.14 (9)	7.65 (7)
Opportunity to receive feedback on the strengths and weaknesses of the case	8.37 (2)	9.71 (1)	8.73 (1)
Ability to discuss interests (like cost) that are not part of the due process hearing	7.74 (7)	8.43 (3)	7.92 (6)
Ability to generate creative solutions not possible through the due process hearing	8.32 (3)	8.43 (3)	8.35 (3)
Opportunity to resolve the matter promptly	7.95 (4)	8.86 (2)	8.19 (4)
Presence of a neutral facilitator to defuse tension between the parties	7.32 (8)	8.00 (6)	7.50 (8)
Confidentiality of negotiations	6.74 (9)	7.29 (8)	6.88 (9)

Finally, in addition to the quantitative data reported above, our survey also asked respondents a series of open-ended questions that provided them the opportunity to tell in us in their own words how they and their clients feel about the BSEA Settlement Conference process. In addition to noting the extremely positive overall tenor of the responses, there are three particular themes that emerge from analyzing them and that are very consistent among all four subgroups of attorneys. First, the qualitative responses confirmed that parties on both sides of special education disputes feel that the Settlement Conference delivers on its promises of timeliness, clarity and finality. One school district attorney reported, for example, that clients are satisfied with the process "because they can walk out with an agreement [where] they know exactly what their

THE SETTLEMENT CONFERENCE

responsibility, if any, will be.” A families’ attorney similarly reported that “I like being able to walk out in one day with a fully executed agreement. Generally, it is favorable for both sides to have a resolution they can both live with without incurring the expense, time investment and uncertainty of litigation.” Another attorney’s opinion that “we have reached equitable agreements and disposed of the case more quickly” was echoed in many other responses.

A second powerful theme that emerges from the qualitative responses is that both parents and school districts appreciate the Settlement Conference because it is a forum in which they feel that their voices are being heard. In this vein, one family-side attorney stated simply that “families feel they are heard;” another reported that, in Settlement Conferences, there is a “much stronger level of respect given to parents than mediation.” Another respondent shared that “I think my clients are respected during the process. They have an opportunity to tell the BSEA their story which can be cathartic for some.” According to one school-side attorney, Settlement Conferences are more effective than mediations in some cases because “parties feel they need their ‘day in court’” and this process “gives that extra ‘court’ aspect to the discussion.” Another school district attorney noted that the process allows all “participants an opportunity to tell their story and explain their side of a case while at the same time working towards a resolution.” The particular role of the facilitator in helping both parties feel listened to in this way was remarked on by numerous attorneys. One stated that the facilitator “leaves both sides feeling that they’ve been heard” and another noted that “clients feel the facilitator is listening to their position.”

The third particularly noteworthy theme is the greater sense of agency that both parents and school district personnel derive from the Settlement Conference process in comparison to going to hearing. One family-side attorney described the feeling this way: “I find that it allows my clients to feel that they have some input into the outcome of their case. The Team process often leaves them feeling side-lined and unempowered, and the hearing process leaves the outcome up to the hearing officer. The Settlement Conference process, however, allows them to be heard and make decisions that are right for them and their family.” A school-side attorney similarly noted that the Settlement Conference “gives the parties more control over the outcome” than proceeding to a due process hearing. An interesting variation on this same theme of greater agency and control, with a focus on joint problem-solving between the parties, was expressed by one respondent who felt that the Settlement Conference “helps greatly in bringing the parties together to manage the outcome of their case as a ‘team,’ rather than through an order by a hearing officer.”

Table 9a
Average Importance of Success Factors
(Families' Attorneys)

On a scale of 1-10 (where 10 is extremely important and 1 is not at all important), how important is each of the following factors to the success of a BSEA Settlement Conference?	Pro bono clients (n=17) (mean and ordinal rank)	Fee-paying clients (n=29) (mean and ordinal rank)	Combined (n=43) (mean and ordinal rank)
Skill of the facilitator	9.64 (1)	9.93 (1)	9.84 (1)
Adequate preparation of the case by attorneys	8.45 (2)	8.85 (2)	8.74 (2)
Proper preparation of clients by their attorneys	7.55 (4)	7.67 (4)	7.63 (4)
Clients' realistic expectations of the risks of going to hearing	8.09 (3)	8.70 (3)	8.53 (3)
Quality of the relationship between the parties	5.00 (6)	5.78 (6)	5.55 (6)
Quality of the relationship between the attorneys	5.80 (5)	6.48 (5)	6.30 (5)

Table 9b
Average Importance of Success Factors
(School Districts' Attorneys)

On a scale of 1-10 (where 10 is extremely important and 1 is not at all important), how important is each of the following factors to the success of a BSEA Settlement Conference?	Retained counsel (n=21) (mean and ordinal rank)	In-house counsel (n=9) (mean and ordinal rank)	Combined (n=29) (mean and ordinal rank)
Skill of the facilitator	9.74 (1)	9.71 (1)	9.73 (1)
Adequate preparation of the case by attorneys	7.95 (3)	8.71 (3)	8.15 (3)
Proper preparation of clients by their attorneys	7.74 (4)	8.14 (4)	7.85 (4)
Clients' realistic expectations of the risks of going to hearing	8.42 (2)	9.14 (2)	8.62 (2)
Quality of the relationship between the parties	5.68 (5)	5.86 (5)	5.73 (5)
Quality of the relationship between the attorneys	5.63 (6)	5.86 (5)	5.69 (6)

THE SETTLEMENT CONFERENCE

In addition to these three overarching themes—all positive about the effectiveness of the Settlement Conference process—it is also important to report those responses that were critical of the process. Though these were too few to cluster into any recurring themes, they nonetheless raise important cautions about the Settlement Conference. One school districts' attorney reported that his or her clients were dissatisfied with the process because they feel that "the BSEA leans too heavily on the school districts and focuses on any missteps, errors, etc., from the school side, but does not do the same with the parent side." Among families' attorneys, there were a few different critiques expressed. One respondent noted concern because "the cost parents must assume to get to the Settlement Conference is rarely recognized." Somewhat similarly, another commented that "the [Settlement Conference] process has effectively ended lawyer-mediated settlements much earlier in the process," presumably resulting in increased time and cost. A third attorney reported that his or her clients are often dissatisfied because "they feel that they have given up too much." Finally, though one attorney believes his or her clients have been satisfied with the outcomes of the Settlement Conference process, "it has felt like a lawyer-driven process," as opposed to one in which the parties are driving the outcome. While both the quantitative and qualitative data from our survey indicate an overall very high level of satisfaction with the BSEA Settlement Conference, the concerns expressed by the very small minority are nonetheless important to keep in mind as the process evolves in Massachusetts and as other jurisdictions consider whether to adopt a similar model.

V. CONCLUSION: LESSONS FOR OTHER JURISDICTIONS

The Bureau of Special Education Appeals in Massachusetts has pioneered a unique mechanism for dispute resolution in special education—the Settlement Conference—that has been implemented successfully for roughly a decade. Our personal experiences with the Settlement Conference, as well as the data maintained by the BSEA, have indicated that it is both a frequently utilized and highly effective process for helping parties settle cases quickly and efficiently, without the time and cost associated with due process hearings. By administering a survey to attorneys currently practicing special education law in Massachusetts, we endeavored to ascertain whether our perceptions of the process are shared by others and to test our underlying presumptions about why the process seems to work well in many cases. As reported above, both the quantitative and qualitative data obtained by our survey tend to confirm our hypothesis that the Settlement Conference is an effective mechanism for resolving special education disputes—at least

insofar as attorney perceptions are a valid measure of its effectiveness. The data indicate that a very high percentage of cases that proceed to a Settlement Conference result in a fully executed settlement agreement—the vast majority on the day of the conference—and that both parents and school districts are perceived by their lawyers to be pleased with the resulting agreements. Our hope is that describing the Settlement Conference in detail, situating it in the context of the other special education dispute resolution options available in Massachusetts, and sharing the data from our survey will be of use to other jurisdictions that may be considering whether or not to include a similar mechanism in their own spectrum of dispute resolution options. To that end, we offer in this Conclusion some reflections about the features of the Massachusetts system that seem to allow for the Settlement Conference's apparent effectiveness.

The defining feature of the Settlement Conference is the opportunity it affords for parties to receive honest feedback on the legal merits of their respective positions. The process can only be as effective as the trust that the parties are willing to repose in the quality of the case assessment they receive. There are several characteristics of the special education dispute resolution system in Massachusetts that tend to encourage a high level of confidence among parents and school districts. First, the fact that hearing officer decisions are not only easily available online but also reported and indexed in the Massachusetts Special Education Reporter allows parties and their attorneys to track developments in the law easily.¹³⁷ This has resulted over time in a well-established and relatively coherent body of local case law that makes the outcome of due process hearings more predictable, thereby facilitating bargaining between the parties.

Another factor contributing to the stability of the system is the statutory requirement that the BSEA employ full-time hearing officers who are knowledgeable and experienced attorneys and a Director who has extensive experience in litigation, administrative law and special education law. Coupled with the fact that the hearing officers are also part of the state employees' collective bargaining unit, this has resulted in a system of low turnover among hearing officers. In addition, the BSEA hearing officers only hear special education matters and, absent unique circumstances, special education matters are only heard by BSEA hearing officers. Consequently,

¹³⁷ This easy accessibility of hearing decisions is not necessarily common across the states. See Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131, 131 (2011) (finding that "the majority of states lacked easy retrieval and consistency with reporting their own published hearings").

THE SETTLEMENT CONFERENCE

the hearing officers have become experts not only in special education law but also in many facets of special education practice. Aside from yielding high quality and well-reasoned decisions, their longevity at the Bureau also results in familiarity with the hearing officers and their jurisprudence. The Settlement Conference facilitator is accordingly able to help the parties predict the likely outcome of a particular case before a particular hearing officer, increasing the likelihood of settlement.

In addition to having confidence in the predictability of legal decision making in special education, the parties must also have a high degree of confidence in the Settlement Conference facilitator in order for the process to be effective. Perhaps even more so than in other fora, the expertise of the officiant is critical to the success of the Settlement Conference process. Because the methodology utilized to facilitate resolution is, at its core, case assessment, the Settlement Conference must be conducted by someone who can truly offer a well-informed, neutral assessment. The person must therefore be seasoned, have extensive experience in the area of special education law/litigation, working knowledge of applicable statutes, regulations and case law, as well as intimate familiarity with the decisions of all hearing officers in the jurisdiction. Furthermore, the settlement facilitator must not only be neutral in fact, but must be perceived, unequivocally, as neutral by parties on both sides of the bar, as the success of the process is in large part dependent on participants' high level of confidence in the facilitator's neutrality. Absent such confidence the value of the case assessment is diminished and parties will be unlikely to utilize the process fully and effectively. The development of this confidence in Massachusetts is buttressed by the fact that, unlike the assignment of cases for due process hearings or Advisory Opinion hearings, Settlement Conferences are not rotated among all the hearing officers; there is primarily one facilitator who is well-disposed to this role rather than multiple facilitators being assigned without regard to how well-suited they are for this particular task.

Finally, it helps that the BSEA is explicitly authorized by statute to experiment with various alternative dispute resolution options. This allows the Director of the Bureau to tinker with new approaches to make them as effective as possible—as is evidenced currently by consideration of modifying the Settlement Conference criteria to include unrepresented parents or those represented by a lay advocate in a manner consistent with the goals of the process. This flexibility has resulted in a system with a rich spectrum of dispute resolution options; the Settlement Conference is one option among many and can serve a specialized purpose without being expected to accomplish every goal (e.g., the relationship-building that is often a part of mediation).

Taken together, these various features of the Massachusetts landscape all point to the larger conclusion that the reason the Settlement Conference is so highly effective is that the underlying special education due process system is a very strong one. If the parties who access the Settlement Conference—parties who already have hearing requests pending before the BSEA—did not have confidence in the fairness, neutrality and quality of the decisions rendered by the Bureau, then the legal case assessment offered in the Settlement Conference would be of little value to them. If school districts did not perceive the BSEA as an entity that will ultimately hold them accountable under the provisions of federal and state special education law, then they would have no incentive to settle cases. Similarly, if parents perceived that the BSEA did not value greatly the work and expertise of educators and school district personnel, then they would be more inclined to run the risk of taking their cases all the way to hearing. While some have called for the dismantling or weakening of the underlying due process protections provided by special education law,¹³⁸ doing so would undermine greatly the ability of parties to resolve their disputes, whether through the Settlement Conference process or by other means.¹³⁹ In our view, the Settlement Conference stands the greatest likelihood of being effective in other jurisdictions that have also placed a high priority on developing special education due process systems that possess features similar to those that contribute to the system's strength in Massachusetts.

Though we believe the Settlement Conference to be an effective form of dispute resolution in Massachusetts and one that other states and territories should consider, several caveats about the process are in order. First, we acknowledge that the reach of the Settlement Conference is necessarily limited by the requirement that it can only be accessed in situations where a due process hearing request has already been filed. As data from the past decade in Massachusetts show, the vast majority of parents who reject their students' IEPs (and thereby, presumably, experience some level of dispute with their school districts) never file hearing requests at the BSEA. There are certainly many reasons for this, but one of them is no doubt the fact that many of these families do not have the financial resources to access the due process hearing system at the BSEA. Even if the criteria that govern the Settlement Conference are altered to allow unrepresented parents to participate in the process, this will only open up access to those parents who

¹³⁸ AM. ASS'N OF SCH. ADMINISTRATORS, *RETHINKING SPECIAL EDUCATION DUE PROCESS* 15–16 (Apr. 2013).

¹³⁹ Weber, *supra* note 27 (“It is no surprise that diplomatic solutions may depend on the backstop of coercion.”).

THE SETTLEMENT CONFERENCE

first have the wherewithal to file a hearing request at the BSEA. For many families, this is an unrealistic expectation. Therefore, as effective a process as the Settlement Conference appears to be for those families who have access to it, we must acknowledge that this will continue to be a small subset of families and we must find other creative ways to help the majority of parents who will never access the BSEA resolve disputes they have with school districts.

Second, while the survey we conducted and report on in this Article contributes significantly to our understanding of the reasons for the effectiveness of the Settlement Conference in Massachusetts, it is important to remember that it is only a survey of attorneys. Surveying parents and school district personnel themselves is necessary in order to gain a more complete picture of how the actual parties to special education disputes—and not just their attorneys—perceive the Settlement Conference and the attributes that make it a more or less satisfactory dispute resolution option.

Lastly, we do not suggest that the Settlement Conference, as it has developed in Massachusetts, be transplanted wholesale into other jurisdictions. Each state and territory has unique features to its special education dispute resolution system that must, of course, guide any determination about whether the Settlement Conference is a worthwhile addition to its system and, if so, how the Massachusetts model could be customized to respond to local imperatives. Nevertheless, with each of these caveats in mind, we recommend the Settlement Conference as an addition to the special education dispute resolution system that has been effective in Massachusetts and that may also help many parents and school districts resolve their disputes more effectively and efficiently in other jurisdictions.

